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MICHAEL RODAK, JR.,

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No.

STATE OF COLORADO, DEPARTMENT OF LABOR AND EMPLOYMENT, DIVISION OF LABOR, JAMES M. SHAFFER, EXECUTIVE DIRECTOR, STATE OF COLORADO, DEPARTMENT OF LABOR AND EMPLOYMENT, DIVISION OF LABOR, INDUSTRIAL COMMISSION OF THE STATE OF COLORADO, HENRY C. KIMBROUGH, IN HIS CAPACITY AS A MEMBER OF THE INDUSTRIAL COMMISSION OF THE STATE OF COLORADO, ALBERT F. MANGAN, IN HIS CAPACITY AS A MEMBER OF THE INDUSTRIAL COMMISSION OF THE STATE OF COLORADO, AND KENNETH C. RUSSELL IN HIS CAPACITY AS A MEMBER OF THE INDUSTRIAL COMMISSION OF COLORADO,

Defendants-Appellants,

VS.

COMMUNICATIONS WORKERS OF AMERICA, AN UNINCORPORATED LABOR ASSOCIATION,

Plaintiff-Appellant,

VS.

WESTERN ELECTRIC COMPANY, INC., A NEW YORK CORPORATION AND THE MOUNTAIN STATES TELEPHONE & TELEGRAPH COMPANY, A COLORADO CORPORATION.

Defendants-Appellees.

JURISDICTIONAL STATEMENT

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COMMUNICATIONS WORKERS OF AMERICA, AN UNINCORPORATED LABOR ASSOCIATION,

Plaintiff-Appellant,

VS.

WESTERN ELECTRIC COMPANY, INC., A NEW YORK CORPORATION AND THE MOUNTAIN STATES TELEPHONE & TELEGRAPH COMPANY, A COLORADO CORPORATION,

Defendants-Appellees.

JURISDICTIONAL STATEMENT

INTRODUCTORY STATEMENT

This appeal is brought by the Colorado Department of Labor and Employment, Division of Labor, James M. Shaffer, Executive Director, the Colorado Industrial Commission, and Henry C. Kimbrough, Albert F. Mangan, and Kenneth C. Russell, members of the Industrial Commission of Colorado.[1] These state agencies and officials will be referred to collectively as the State of Colorado.

OPINIONS BELOW

The opinion of the District Court in and for the City and County of Denver, Colorado (Appendix A) is not reported. The opinion of the Colorado Supreme Court (Appendix B) is reported at 551 P.2d 1065 (1976).

GROUNDS ON WHICH JURISDICTION IS INVOKED

1. *The nature of the proceeding.* The plaintiff, a labor union, brought this action to enforce maintenance of membership and modified agency shop provisions contained in its collective bargaining agreements with two employers. The Colorado Supreme Court affirmed the district court's holding that the contract provisions were invalid and unenforceable because all-union referenda elections to approve the provisions had not been held as required by state law. C.R.S. 1963, 80-4-6(1)(d) (1969 Perm. Supp.), now C.R.S. 1973, 8-3-108(1)(c). Further, the supreme court held that the formation of a collective bargaining unit as defined by state law was a necessary prerequisite to conducting an all-union referendum election. C.R.S. 1963, 80-4-2(6), now C.R.S. 1973, 8-3-104(4). Even though the collective bargaining units involved had been certified or recognized by

[1] During the pendency of the litigation, James M. Shaffer has been succeeded by John I. Lay. Henry C. Kimbrough and Albert F. Mangan have been succeeded by Mike L. Baca and Yusuf Kaurouma.

the National Labor Relations Board, the court held that these units were not "collective bargaining units" within the meaning of Colorado law because they had not been formed pursuant to secret ballot elections. The court rejected the argument that federal law preempted the state definition of collective bargaining unit.

2. *The judgment sought to be reviewed* was entered by the Colorado Supreme Court on June 7, 1976. Petitions for rehearing were filed by the Communications Workers of America ("CWA") on June 16 and June 29, 1976. The court modified its opinion and denied the petitions for rehearing on July 6, 1976 (Appendix C). Motions by CWA and the State of Colorado to stay the court's mandate were granted on July 8, 1976. CWA filed a notice of appeal on July 19, 1976 and the State of Colorado filed a notice of appeal on September 15, 1976 (Appendix D).

3. *The statutory provision believed to confer jurisdiction on this Court* is 28 U.S.C. § 1257(2).

4. *Cases believed to sustain jurisdiction* are *Bethlehem Steel Company v. New York State Labor Relations Board*, 330 U.S. 767 (1947) and *La Crosse Telephone Corporation v. Wisconsin Employment Relations Board*, 336 U.S. 18 (1949).

5. *State statutes whose validity is involved:*

C.R.S. 1963, 80-4-6(1)(d) (1969 Perm. Supp.), now C.R.S. 1973, 8-3-108(1)(c) provides in relevant part:

> It is an unfair labor practice for an employer, individually or in concert with others:
>
> * * *
>
> (d) To encourage or discourage membership in any

> labor organization, employee agency, committee, association, or representation plan by discrimination in regard to hiring, tenure, or other terms or conditions of employment; except, that an employer shall not be prohibited from entering into an all-union agreement with the representatives of his employees, in a collective bargaining unit, where three-quarters or more of his employees shall have voted affirmatively by secret ballot in favor of such all-union agreement in a referendum conducted by the director.

C.R.S. 1963, 80-4-2(6), now C.R.S. 1973, 8-3-104(4) provides:

> The term "collective bargaining unit" shall mean an organization selected by secret ballot, as provided in section 80-4-5 [now section 8-3-107], by a majority vote of the employees of one employer employed within the state who vote at an election for the selection of such unit, provided that where a majority of such employees engaged in a single craft, division, department, or plant shall have voted by secret ballot, that the employees of such single craft, division, department or plant shall constitute their collective bargaining unit, it shall be so considered. Two or more collective bargaining units may bargain collectively through the same representative or representatives where a majority of the employees in each separate unit shall have voted so to do by secret ballot as provided in section 80-4-5 [now section 8-3-107].

QUESTION PRESENTED

Does federal law preempt a state law which requires a secret ballot election to determine a collective bargaining unit as a condition precedent to the employee representative

entering into a union security agreement when the National Labor Relations Board previously certified or recognized the appropriate collective bargaining unit for the employees involved?

STATEMENT OF THE CASE

CWA brought two declaratory judgment actions, which were consolidated for trial, against Western Electric Company and Mountain States Telephone & Telegraph Company. Joined as defendants were the Colorado Department of Labor and Employment, Division of Labor; the Colorado Industrial Commission; and various officials of these state agencies.

At issue were seven collective bargaining agreements between CWA and the two employers. Each agreement contained union security provisions which are set forth in full at 551 P.2d 1065, 1068-1073. During the lives of these agreements, several employees subject to the union security provisions had ceased paying to the union an amount equivalent to union dues and CWA had demanded that the employees be terminated. Both employers refused to discharge the employees on the grounds that none of the union security provisions had been approved by the affected employees in an all-union referendum election pursuant to C.R.S. 1963, 80-4-6(1)(d) (1969 Perm. Supp.), now C.R.S. 1973, 8-3-108(1)(c). CWA subsequently brought these actions in the District Court in and for the City and County of Denver, Colorado seeking to have the union security provisions declared valid and enforceable.

The district court held that the union security provisions in question were "all-union agreements" within the definition of the Colorado Labor Peace Act. C.R.S. 1963, 80-4-2(8), now C.R.S. 1973, 8-3-104(1). The court con-

cluded that the provisions were invalid and unenforceable because no all-union agreement referenda elections had been held. Appendix A, ¶ 20. The question of federal preemption was argued to the district court and was discussed at length in the court's opinion. See Appendix A at ¶¶ 5-11.

On appeal, the Colorado Supreme Court affirmed the district court's judgment. It further held that formation of a "collective bargaining unit" as defined by C.R.S. 1963, 80-4-2(6) [now C.R.S., 8-3-104(4)], is a "condition precedent to any labor organization's right to enter into an all-union agreement with an employer under Colorado law." 551 P.2d at 1076. Although the collective bargaining units involved had been recognized or certified by the National Labor Relations Board, the court said that the requirements of state law had not been met because the units had not been formed pursuant to secret ballot elections. In the court's view, "a secret ballot election, as described by section 80-4-2(6) [now section 8-3-104(4)], is the exclusive method by which a collective bargaining unit subject to the 'all-union' referendum provisions of section 80-4-6(1)(d) [now section 8-3-108(1)(c)] may be recognized." *Id.* The court rejected the argument that federal unit certification procedures preempted a second unit certification by the state and concluded that:

> [T]he procedures for establishing a collective bargaining unit under the Colorado Labor Peace Act are merely an incident of the state's power to prohibit the application of union security agreements under the permissive grant of authority contained in § 14(b) of the Taft-Hartley Act.

Id. at 1079. Thus, the court concluded that the union security provisions were invalid and unenforceable for two reasons: first, the collective bargaining units had not been

formed pursuant to secret ballot elections and second, the union security provisions were not approved through all-union referenda.

Chief Justice Pringle dissented on the grounds that section 14(b) of the Taft-Hartley Act, 29 U.S.C. § 164(b), does not permit states to engage in this type of regulation.

Timely appeals from the Colorado Supreme Court's decision have been taken both by CWA and the State of Colorado. The state's appeal is limited to the single issue of whether the court erred in holding that the state must conduct a secret ballot election to determine a collective bargaining unit as a condition precedent to an all-union referendum election when the National Labor Relations Board has recognized or certified the appropriate collective bargaining unit.

SUBSTANTIALITY OF FEDERAL QUESTIONS

This case presents significant issues of federal-state relations in the area of collective bargaining. It is of great importance to the state that this case be reviewed because the court's decision conflicts with the consistent administrative interpretation which the state has given to the Colorado Labor Peace Act since its inception. Prior to this decision, the state agency conducted unit certification elections only for those units which were not within the jurisdiction of the National Labor Relations Act. The state did not construe the act as requiring a state unit certification election, as a prerequisite to an all-union agreement referendum, for units which previously had been certified or recognized by the National Labor Relations Board.

The Colorado Supreme Court's decision with respect to the determination of the appropriate collective bargaining

unit appears to be in conflict with several decisions of this court including *Bethlehem Steel Company v. New York State Labor Relations Board*, 330 U.S. 767 (1947), *La Crosse Telephone Corporation v. Wisconsin Employment Relations Board*, 336 U.S. 18 (1949), and *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468 (1955). As this court has stated, the National Labor Relations Board's "machinery for dealing with certification problems also carries implications of exclusiveness." *Weber v. Anheuser-Busch, Inc., supra*, 348 U.S. at 476. Here the state definition of collective bargaining unit differs from the federal standards found in 29 U.S.C. § 159(b) and there is a real possibility that the state may certify a different collective bargaining unit than the National Labor Relations Board would in the same case. For example, contrary to the federal standard, the state definition does not prohibit inclusion of supervisors in a collective bargaining unit.

In *Bethlehem Steel Company v. New York State Labor Relations Board, supra*, this court recognized the inherent conflict present when both state and federal authorities attempt to determine the appropriate collective bargaining unit:

> Thus, if both [state and federal] laws are upheld, two administrative bodies are asserting a discretionary control over the same subject matter, conducting hearings, supervising elections and determining appropriate units for bargaining in the same plant. They might come out with the same determination, or they might come out with conflicting ones as they have in the past. . . . But the power to decide a matter can hardly be made dependent on the way it is decided.

330 U.S. at 775. The *Bethlehem* court concluded that the state regulation could not be upheld, saying:

> If the two [state and federal] boards attempt to exercise concurrent jurisdiction of the appropriate unit of representation, action by one necessarily denies the discretion of the other. . . . The federal board has jurisdiction of the industry in which these particular employers are engaged and has asserted control of their labor relations in general. . . . We do not believe this leaves room for the operation of the state authority asserted.

Id. at 776.

Where, as here, the National Labor Relations Board has certified or recognized the collective bargaining unit involved, the case for federal preemption is clear. As a contemporary commentary on the *La Crosse* case, *supra*, observed:

> [B]y hypothesis, there cannot be two representatives or two bargaining units for the same employees. Any determination made by one agency with respect to the holding of an election or the scope of the bargaining unit would affect employee activities for a considerable period in the future, thus shaping any action which the other agency might take.

A. Cox and M. Seidman, "Federalism and Labor Relations," 64 Harv. L. Rev. 211, 218 (1950). The criteria for application of the federal preemption doctrine, as discussed in *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission*, 44 U.S. L. W. 5026, 5027-8 (U.S. 1976), are met in this case. The requirement of a state certified collective bargaining unit as a "condition precedent" to the parties entering into a union security agreement is inconsistent with the federal regulatory scheme and interferes with the employees' right of

self-organization. *Hill v. Florida*, 325 U.S. 538 (1945). *See generally* A. Cox, "Labor Law Preemption Revisited," 85 Harv. L. Rev. 1337 (1972).

The Colorado Supreme Court found authority for state certification of collective bargaining units by characterizing the procedure as incidental to the state's power under § 14(b) of the Taft-Hartley Act, 29 U.S.C. § 164(b). But plainly such power cannot be implied. As this court recently noted:

> There is nothing in § 14(b)'s language or legislative history to suggest that there may be applications of right-to-work laws which are not encompassed under § 14(b) but which are nevertheless permissible.

Oil, Chemical and Atomic Workers v. Mobil Oil Corporation, 44 U.S. L. W. 4842, 4844 n.7 (U.S. 1976). The scope of § 14(b) must be determined in light of § 8(a)(3), 29 U.S.C. § 158(a)(3). *Id.* at 4845. When this court accepted the Wisconsin all-union agreement referendum procedure (which is the model for the Colorado law), no assertion was made by the state of authority to certify the collective bargaining unit. *Algoma Plywood & Veneer Company v. Wisconsin Employment Relations Board*, 336 U.S. 301 (1949). See *Wisconsin Employment Relations Board v. Algoma Plywood & Veneer Company*, 252 Wis. 549, 558-559, 32 N.W.2d 417, 421 (1948). Indeed, the Colorado requirement of dual unit certification, newly created by the state supreme court's decision, directly conflicts with § 8(a)(3)(i), 29 U.S.C. § 158(a)(3)(i), which permits an employer to enter into a union shop agreement only:

> if such labor organization is the representative of the employees as provided in section 159(a) of this title,

> in the appropriate collective-bargaining unit covered by such agreement when made.

Section 8(a)(3) plainly contemplates that the appropriate collective bargaining unit will be determined by the National Labor Relations Board under § 9.

Thus, the Colorado Supreme Court's decision is a major departure from the interpretation given to the act by the state and the application of the decision poses serious problems for all of the parties concerned.

First, the decision places an employer, who is within the jurisdiction of the federal act, in a dilemma. Under the state court's decision, he may enter into an all-union agreement only with the employee representative of a collective bargaining unit determined by the state. But under federal law, he commits an unfair labor practice unless he makes such an agreement with the employee representative of the appropriate collective bargaining unit as determined by federal law.

Second, a labor union, which has been recognized or certified by the National Labor Relations Board as the representative of an appropriate bargaining unit, may find its unit changed or fractionalized by virtue of another "unit determination" under Colorado law. The union may find itself hampered in bargaining or even bargaining for only a portion of the Colorado members it represents.

Finally, and most critically, the state will be obligated to conduct elections to redetermine units already recognized or certified by the National Labor Relations Board. This election process will cost the state large sums of money, will create additional administrative burdens, and may invalidate contract provision concerning union security for which

a referendum was held, but no Colorado unit election was conducted.

If the orderly conduct of collective bargaining is to be maintained in Colorado, this conflict between the Colorado Supreme Court's decision and federal law must be resolved. The federal questions are substantial and the need for a determination by this court is great.

CONCLUSION

The State of Colorado respectfully urges this court to take jurisdiction over this appeal and to reverse the Colorado Supreme Court on this issue.

Respectfully submitted,

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APPENDIX A

IN THE DISTRICT COURT IN AND FOR THE
CITY AND COUNTY OF DENVER
STATE OF COLORADO

Civil Action Nos. C-18-238 and C-18-239 (Consolidated)
Courtroom No. 1

COMMUNICATIONS WORKERS OF AMERICA, (an unincorporated labor association),

Plaintiff,

vs.

WESTERN ELECTRIC COMPANY, INCORPORATED (a New York corporation); STATE OF COLORADO, DEPARTMENT OF LABOR AND EMPLOYMENT, DIVISION OF LABOR; JAMES M. SHAFFER, Executive Director, State of Colorado, Department of Labor and Employment, Division of Labor; INDUSTRIAL COMMISSION OF THE STATE OF COLORADO; HENRY C. KIMBROUGH, in his capacity as a member of the Industrial Commission of the State of Colorado; ALBERT F. MANGAN, in his capacity as a member of the Industrial Commission of the State of Colorado; and KENNETH C. RUSSELL, in his capacity as a member of the Industrial Commission of Colorado; and THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY (a Colorado corporation),

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS MATTER is before the Court pursuant to a record of evidence stipulated by the parties. On that basis, on the basis of briefs submitted by certain of the parties and on the basis of counsel's arguments and comments to Court, this Court makes the following findings of fact and conclusions of law in accordance with Colorado Rule of Civil Procedure 52(a).

FINDINGS OF FACT

1. The plaintiff, Communications Workers of America (hereafter CWA), is an unincorporated labor organization which has its international headquarters in Washington, D.C., and its principal Colorado place of business in Denver. At all times relevant hereto, and under 1968 and 1971 collective bargaining agreements, it lawfully was and is entitled to represent as exclusive bargaining agent certain employees of the industrial field forces of the Service Division of Western Electric Company, Incorporated (hereafter Western Electric), in the several states of the United States of America, including the State of Colorado. Similarly, as exclusive bargaining agent, CWA also lawfully was and is entitled to represent certain employees in the Plant and Traffic Departments of defendant The Mountain States Telephone and Telegraph Company (hereafter Mountain Bell).

2. Defendant Western Electric, is a New York corporation, duly authorized to do and is doing business in the State of Colorado and manufactures, supplies and furnishes services and materials to Bell System associated companies, including Defendant Mountain Bell, in the several states of the United States of America.

3. Defendant Mountain States Telephone and Telegraph Company is a Colorado corporation duly authorized to do and is doing business in the states of Arizona, Colorado, Idaho, New Mexico, Montana, Utah, Wyoming and

El Paso County, Texas, under the trade name Mountain Bell.

4. Defendant James M. Shaffer is the lawfully designated and selected executive director of the Department of Labor and Employment, Division of Labor, for the State of Colorado, and, as such, has the responsibility to enforce the provisions of the Colorado Labor Peace Act C.R.S. § 80-4-1, *et seq.*, (1963 as amended).

5. Defendants State of Colorado, Department of Labor and Employment, Division of Labor; Industrial Commission of the State of Colorado; and members Kimbrough, Mangan and Russell, and their successors, in their capacities as members of the Industrial Commission of the State of Colorado are vested with certain authority in accordance with C.R.S. § 80-4-1, *et seq.*, (1963 as amended).

6. Defendant Western Electric made and entered into a written contract sometimes referred to as a collective bargaining agreement, denominated as Contract CWA-12 with plaintiff on or about May 1, 1968, which contract amended and extended a contract between the parties denominated as Contract CWA-11, covering certain communication equipment workers of the installation field forces of the Service Division of said defendant, which contractual arrangements have, at all times relevant and material herein until July, 1971, been in full force and effect. Article 24 of said contract CWA-12 reads, in pertinent part, as follows:

ARTICLE 24

Maintenance of Union Dues

1. Each Employee who is a member of the Union:

(a) on or after the 30th calendar day following the beginning of his employment, or

(b) on or after the effect date of this contract whichever is the latest, shall, as a condition of employment pay or tender to the Union an amount equal to the periodic Union dues until the final termination of this contract, except that each such Employee may, within the ten (10) day period immediately preceding the termination date of this contract, terminate his obligations to tender periodic Union dues to the Union as a condition of employment by notifying both the Union and the Company of his withdrawal from membership in the Union.

1.1 Said condition of employment shall reapply to any such Employee after his return to the bargaining unit following any period of formal separation* therefrom, provided such Employee is a member of the Union on or after the 30th day following his return to the bargaining unit.

2. The provision of this Article 24 shall not be effective if inconsistent with the law of the applicable State.

3. The Company may inform Employees and applicants for employment of their rights and obligations under the provisions of this Article 24.

7. Because job clerks also are employed in the installation field forces of the Service Division of said Defendant, Western Electric made and entered into a written contract sometimes referred to as a collective bargaining agreement with plaintiff covering said employees and denominated as Contract CWA-JC-12 on or about May 1, 1968, which contract amended and extended a contract denominated as

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* Includes:
Transfers out of the bargaining unit. Removal from the payroll of the Company. Leaves of Absence of more than one (1) month duration.

Contract CWA-JC-11 between said parties, and which contractual agreements have at all times relevant and material herein until July, 1971, been in full force and effect. Article 23 of said Contract CWA-JC-12 reads in pertinent part as follows:

ARTICLE 23

Maintenance of Union Dues

1. Each Employee who is a member of the Union:

(a) on or after the 30th calendar day following the beginning of his employment, or

(b) on or after the effective date of this contract, whichever is the latest, shall, as a condition of employment pay or tender to the Union an amount equal to the periodic Union dues until the final termination of this contract, except that each such Employee may, within the 10 day period immediately preceding the termination date of this contract terminate his obligation to tender periodic Union dues to the Union as a condition of employment by notifying both the Union and the Company of his withdrawal from membership in the Union.

1.1. Said condition of employment shall reapply to any such Employee after his return to the bargaining unit following any period of formal separation* therefrom,provided such Employee is a member of the Union on or after the 30th day following his return to the bargaining unit.

---

* Includes:
Transfers out of the bargaining unit. Removal from the payroll of the Company. Leaves of Absence of more than one (1) month duration.

2. The provisions of this Article 23 shall not be effective if inconsistent with the law of the applicable State.

3. The Company may inform Employees and applicants for employment of their rights and obligations under the provisions of this Article 23.

8. Defendant Mountain Bell made and entered into a written contract sometimes referred to as a collective bargaining agreement, on or about May 9, 1968, with the plaintiff, covering certain employees in the Plant Department of said defendant, which Agreement reads in pertinent part as follows:

"2.1 The Company and the Union agree that they will not interfere with the rights of employees to join or refrain from joining the Union and agree that they will not in any manner, because of an employee's membership or nonmembership therein directly or indirectly discriminate against, interfere with, coerce, restrain, discharge, demote, transfer, or discipline any employee.

. . . .

"14.1 Each employee who is a member of the Union on or after the 30th calendar day following the beginning of his employment, or on or after the effective date of this Agreement, whichever is the later, shall as a condition of employment pay or tender to the Union an amount equal to the periodic Union dues until the termination of this Agreement, except that each such employee may, within the 10-day period immediately preceding May 9, 1971, upon which date the Agreement terminates, terminate his obligation to tender periodic Union dues to the Union as a condition of employ-

ment by notifying both the Union and the Company in writing of his withdrawal from membership in the Union.

"14.2 Said condition of employment shall reapply to any such employee after his return to the bargaining unit following any transfer out of the bargaining unit, any removal from the payroll of the Company, or any leave of absence of more than one month's duration, provided such employee is a member of the Union on or after the 30th day following his return to the bargaining unit.

"14.3 The provisions of this Article shall not apply to any employee in any state in which the application of such provision would be inconsistent with the law of such State.

"14.4 The Company may inform employees and applicants for employment of their rights and obligations under the provisions of this Article."

9. The defendant, Mountain Bell, made and entered into a written contract sometimes referred to as a collective bargaining agreement, on or about May 9, 1968, with the plaintiff, covering certain employees in the Traffic Department of the defendant, which Agreement reads in pertinent part as follows:

"1.1 The Company, it's officers and supervisors, shall not interfere with the rights of employees to become and remain members of the Union and shall not in any manner, directly or indirectly, discriminate against, interfere with, coerce, restrain, discharge, demote, transfer or discipline any employee by reason of his or her membership or nonmembership in the Union.

. . . .

"Article 15

"*Section 1: Maintenance of Dues*

"1.1 Each employee who is a member of the Union on or after the 30th calendar day following the beginning of her employment, or on or after the effective date of this Agreement, whichever is the later, shall as a condition of employment pay or tender to the Union an amount equal to the periodic Union dues until the termination of this Agreement, except that each such employee may, within the 10 day period, immediately preceding May 9, 1971, upon which date the Agreement terminates, terminates his obligation to tender periodic Union dues to the Union as a condition of employment by notifying both the Union and the Company in writing of her withdrawal from membership in the Union.

"1.2 Said condition of employment shall reapply to any such employee after her return to the bargaining unit following any transfer out of the bargaining unit, any removal from the payroll of the Company, or any Leave of Absence of more than one month's duration, provided such employee is a member of the Union on or after the 30th day following her return to the bargaining unit.

"1.3 The provisions of this Article shall not apply to any employee in any State in which the application of such provision would be inconsistent with the law of such State.

"1.4 The Company may inform employees and applicants for employment of their rights and obligations under the provision of this Article."

12. During the term of Mountain Bell's two collective bargaining agreements with CWA, numerous employees of the defendant in the State of Colorado and within the bargaining units covered by the provisions of the foregoing collective bargaining agreements were members of the plaintiff on or after the thirtieth calendar day following the beginning of their employment or on or after the effective date of said collective bargaining agreements and thereafter ceased paying or tendering to the union an amount equal to their periodic union dues. In each case where said individuals ceased payments of their periodic union dues, they did not cease payment within the ten day period immediately preceding the termination date of the applicable collective bargaining agreement, the "escape" period under said contracts. On or about June 3, 1970, and again on or about September 3, 1970, plaintiff demanded that Mountain Bell dismiss the employees who had so ceased paying or tendering to the union an amount equal to their periodic union dues and who, it was alleged, were in violation of said contract provisions set out above in paragraphs 8 and 9. Defendant Mountain Bell refused to dismiss such employees contending that the above-cited provisions were of no effect in light of the provisions of the Colorado Labor Peace Act, C.R.S. § 80-4-1 *et seq.* (1963 as amended).

11. During the term of Western Electric's contracts with plaintiff, CWA-12 and CWA-JC-12, numerous employees in the State of Colorado of defendant Western Electric in the appropriate bargaining unit covered by said contracts were members of plaintiff on or after the thirtieth calendar day following the beginning of their employment or on or after the effective date of the applicable collective bargaining agreement and ceased paying or tendering to the union an amount equal to their periodic union dues. In each case such cessation did not occur within the ten day period immediately preceding the termination date of the appli-

cable collective bargaining agreement, the "escape" period under said contracts.

12. On or about June 5, 1970, P. J. Morgan, National Director of Plaintiff and its authorized agent in dealing with defendant Western Electric, addressed letters to Robert W. Benson, Labor Relations Manager and authorized agent of said defendant under the 1968 contracts referred to above demanding that said defendant take such action as is required under the aforesaid Articles 23 and 24, including termination of employment of said employees.

13. On or about June 16, 1970, the said Robert W. Benson, on behalf of the said defendant, replied by letter to National Director Morgan's letter of June 5, 1970, stating that, "Certain provisions of the laws of the State of Colorado prohibit an employer from entering into an agreement with representatives of its employees which provides for union security unless the Industrial Commission of Colorado certifies that three-quarters or more of the bargaining unit employees voting in a referendum shall have voted affirmatively in favor of such an agreement." In said letter the said Robert W. Benson went on to describe the said defendant's position that,

> ". . .
>
> since no such referendum has been conducted among the bargaining unit employees based in Colorado, it would violate Colorado law to condition the employment of these employees upon the payment of union dues. Accordingly, we must deny your request that the Company terminate the above-named employees because of their alleged failure to pay dues to the Union because the contract articles have no effect in light of the provisions of the Colorado Labor Peace Act, C.R.S. 80-4-1 (1963), *et seq.*, as amended.

Defendant Western Electric therefore refused to dismiss said employees.

14. An "all-union" referendum election pursuant to C.R.S. 80-4-6(1)(d) (1963) has not been held with respect to any of the aforesaid contracts.

15. No extant material or notes concerning the bargaining history and practices surrounding the applicable provisions of any of the aforesaid collective bargaining agreements exist to aid the court in interpreting their intent and the aforesaid contract Articles are the only evidence before this court concerning bargaining history.

16. In July, 1971, defendant Western Electric entered into a written collective bargaining agreement effective August 14, 1971, after expiration of the "escape period" and ratification and approval by the members and President of plaintiff, denominated as contract CWA-13 and covering certain communication equipment workers of the installation field forces of the said Service Division of said defendant, which contractual arrangements have, at all times relevant and material herein from said date, been in full force and effect. Article 24 of said Contract CWA-13 reads in pertinent part as follows:

ARTICLE 24

Union Security

1. Each Employee who is a member of the Union on the date of ratification or approval of this Contract by the President of the Communications Workers of America, whichever is later, or who later becomes a member of the Union and all Employees hired on or after such date shall as a condition of employment pay

or tender to the Union amounts equal to the periodic dues applicable to members for the period from such date of ratification or approval or the date of later becoming a member or, in the case of Employees hired on or after such date of ratification or approval, thirty (30) days after hire, whichever of these dates is later until the termination of this Contract, except that an Employee may terminate this condition of employment by giving written notice to the Company and the Union of such termination, and, if applicable, his or her withdrawal from membership in the Union, by registered mail, return receipt requested, and postmarked with the ten (10) day calendar period immediately preceding 11:59 P.M. July 27, 1971.

2. The condition of employment specified in Paragraph 1 shall not apply during the periods of formal separation* from the bargaining unit by any such Employee but shall reapply to such Employee on the thirtieth (30th) day following his or her return to the bargaining unit.

3. The Company may inform Employees and applicants for employment of their rights and obligations under the provisions of this article.

4. This article shall apply only in those States and the District of Columbia where the law permits the Union to enter into this type of union security agreement. If during the term of this Contract the Union shall become duly authorized under the laws of any other State to enter into this type of union security agreement, the effective date of this article as to Employees in such

* The term "formal separation" includes transfers out of the bargaining unit, removal from the payroll of the Company, and Leaves of Absence of more than one (1) month duration.

State shall be the date upon which the Company receives proper written evidence from the Union that it is fully qualified to enter into such an agreement in such State.

17. In July, 1971, defendant Western Electric entered into a written collective bargaining agreement, effective on August 14, 1971, after expiration of the "escape period" and ratification and approval by the members and President of plaintiff, denominated as Contract CWA-JC-13 and covering job clerks employed in the installation field forces of the said Service Division of said defendant, which contractural arrangements have, at all times relevant and material herein from said date, been in full force and effect. Article 23 of said Contract CWA-JC-13 reads in pertinent part as follows:

ARTICLE 23

Union Security

1. Each Employee who is a member of the Union on the date of ratification or approval of this Contract by the President of the Communications Workers of America, whichever is later, or who later becomes a member of the Union and all Employees hired on or after such date shall as a condition of employment pay or tender to the Union amounts equal to the periodic dues applicable to members for the period from such date of ratification or approval or the date of later becoming a member or, in the case of Employees hired on or after such date of ratification or approval, thirty (30) days after hire, whichever of these dates is later until the termination of this Contract, except that an Employee may terminate this condition of employment by giving written notice to the Company and the Union

of such termination, and, if applicable, his or her withdrawal from membership in the Union, by registered mail, return receipt requested, and postmarked within the ten (10) day calendar period immediately preceding 11:59 P.M., July 27, 1971.

2. The condition of employment specified in Paragraph 1 shall not apply during periods of formal separation * from the bargaining unit by any such Employee but shall reapply to such Employee on the thirtieth (30th) day following his or her return to the bargaining unit.

3. The company may inform Employees and applicants for employment of their rights and obligations under the provisions of this article.

4. This article shall apply only in those States and the District of Columbia where the law permits the Union to enter into this type of union security agreement. If during the term of this Contract the Union shall become duly authorized under the laws of any other State to enter into this type of union security agreement, the effective date of this article as to Employees in such State shall be the date upon which the Company receives proper written evidence from the Union that it is fully qualified to enter into such an agreement in such State.

18. On or about the 18th day of July, 1971, Mountain Bell entered into a written collective bargaining agreement, with CWA, as representative of certain employees in the Plant and Traffic Departments of the company, which agreement reads in pertinent part as follows:

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* The term "formal separation"includes transfers out of the bargaining unit, removal from the payroll of the Company, and Leaves of Absence of more than one (1) month duration.

"2.1 The Company and the Union agree that they will not interfere with the rights of employees to join or refrain from joining the Union and agree that they will not in any manner, because of an employee's membership or nonmembership therein directly or indirectly discriminate against, interfere with, coerce, restrain, discharge, demote, transfer, or discipline any employee.

. . . .

"ARTICLE 21

"Modified Agency Shop

"21.1 Each regular employee who is a member of the Union on the date of ratification or approval of this agreement by the President of the Union, whichever is later, or who later becomes a member of the Union and all regular employees hired on or after that date shall as a condition of employment pay or tender to the Union amounts equal to the periodic dues applicable to members for the period from such date of ratification or approval or the date of later becoming a member or, in the case of regular employees hired on or after such date of ratification or approval, 30 days after hire, whichever of these dates is later until the termination of this contract, except that an employee may terminate this condition of employment by giving written notice to the Company and the Union of such termination, and, if applicable, his withdrawal from membership in the Union by registered mail, return receipt requested, and postmarked within the ten-day calendar period immediately preceding 11:59 P.M., July 28, 1971.

"21.2 Said condition of employment shall reapply to

any such employee after returning to the bargaining unit following any transfer out of the bargaining unit, any removal from the payroll of the Company, or any leave of absence of more than one month's duration, provided such employee is a member of the Union on or after the 30th day following return to the bargaining unit.

"21.3 The provisions of this Article shall not apply to any employee in any state in which the application of such provision would be inconsistent with the law of such State.

"21.4 The Company may inform employees and applicants for employment of their rights and obligations under the provisions of this Article."

19. An "all-union" referendum election pursuant to C.R.S. § 80-4-6(1)(d) (1963 as amended) has not been held with respect to the aforesaid 1971 collective bargaining agreements.

20. A controversy has arisen between plaintiff and defendants concerning the scope of applicability of the alleged prohibitory and/or regulatory provisions of the Colorado Labor Peace Act C.R.S. §§ 80-4-1 *et seq.* (1963 as amended), and the effect of such statutory scheme upon the construction of each and all of the aforesaid contractual provisions as between the plaintiff and defendants Western Electric and Mountain Bell.

21. Entry of a decree declairing plaintiff's and defendants' rights, status and legal relations under the aforementioned provisions of said written contracts will terminate the controversies presented between the plaintiff and said defendants herein.

22. The relief sought by the plaintiff and the defendants herein is provided for by C.R.S. §§ 77-11-1 *et seq.* (1963, as amended) and Colorado Rule of Civil Procedure 57, and all of the defendants herein are parties who have or claim any interests which will be affected by the within requested declaratory judgment.

23. This controversy was submitted to the court by stipulation upon an agreed statement of facts as contemplated by Colorado Rule of Civil Procedure 57(d), supported by the required affidavits. The controversy thus presented is real and filed in good faith by all parties hereto to determine the rights of the said parties.

CONCLUSIONS OF LAW

1. A justiciable controversy exists between plaintiff and the defendant Western Electric concerning the enforcement and application of Article 24 of CWA-12, Article 23 of CWA-JC-12, Article 24 of CWA-13 and Article 23 of CWA-JC-13, and between plaintiff and defendant Mountain Bell concerning the enforcement and application of each of those clauses referred to above in contracts between CWA and Mountain Bell, in the State of Colorado in the absence of an "all-union referendum" conducted by the Industrial Commission of the State of Colorado pursuant to the Colorado Labor Peace Act, C.R.S. §§ 80-4-1 *et seq.* (1963, as amended).

2. Declaratory relief pursuant to C.R.S. §§ 77-11-1 *et seq.* (1963) and Colorado Rule of Civil Procedure 57 is appropriate and may be granted since all defendants herein are parties who have or may claim an interest herein which may be affected by the within relief.

3. This court has jurisdiction over the subject matter of this action and jurisdiction over the parties.

4. In 1935, Congress passed the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (1964), and thereby undertook to regulate generally conduct by unions and employers in the field of labor management relations. Section 7 of that Act defined the rights of all employees to engage in or refrain from union activity,

> "except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

Section 8(3) provided that it was unfair labor practice for an employer to discriminate in any term, condition or tenure of employment because of union activity except,

> "that nothing in this Act . . . or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein . . . .

5. Section 8(3) did not result in congressional preemption of any state regulation of any union security clause or device, such as those in issue before this Court. According to the United States Supreme Court "Section 8(3) merely disclaim[ed] a national policy hostile to the closed shop or other forms of union-security agreement," *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board*, 336 U.S. 301, 307 (1949), and allowed the states "to pursue their 'own more restrictive policies'," *id.* at 314, over union security devises. That conclusion by the United States Supreme Court was drawn from the legislative history of the Wagner Act of 1935, prior to the Taft-Hartley amendments of 1947.

6. In 1947, Congress added the Taft-Hartley amendments to the National Labor Relations Act, which restricted severely the scope of permissible union security clauses penalizing employees for non-union membership by outlawing the closed shop entirely. Permissible employment discrimination under union security clauses was limited to "failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or maintaining membership [in the union]." 29 U.S.C. § 158(a)(3)(b) (1964). Furthermore, by federal law, an employee had to be given thirty days prior to the time that his "membership" obligation under any union security clause could be enforced against him. The Taft-Hartley amendments also added Section 14(b), popularly known as the "right-to-work" provision, which specifically authorized state regulation of a union security:

> "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any state or territory in which such execution or application is prohibited by state or territorial law." 29 U.S.C. § 164(b) (1964)

The Supreme Court determined and this court is bound by the finding that Section 14(b) "was included [solely] to forestall the inference that federal policy was to exclusive . . ." in the matter of union security. *W.E.R.B. v. Algoma Plywood & Veneer Co., supra*, 336 U.S. at 314. Thus, it was added, not to add other union security devices to the list of those a state could regulate, but to emphasize what was intended originally in the Wagner Act of 1935—that a state could regulate or prohibit any union security device it desired. Federal labor policy has remained unchanged in that area since 1935. As the *Algoma* court had concluded, even in the absence of Section 14(b), and as confirmed by its

view of the legislative history of the Wagner Act neither § 8(3) nor any other provision of the National Labor Relations Act resulted in congressional preemption of state regulation of union security clauses or devices, including the union shop, agency shop, modified union shop, modified agency shop, discriminatory hiring halls, maintenance of dues, maintenance of membership and the like, such as each of those clauses in issue before this Court. *Accord, Motorcoach Employees v. Lockridge*, 403 U.S. 274, 297 (1971).

7. *N.L.R.B. v. General Motors*, 373 U.S. 734 (1963) merely defined that under the Wagner Act and Taft-Hartley amendments, states could regulate any union security device compelling any employee to pay money to a labor union and *Retail Clerks, Local 125 v. Schermerhorn*, 375 U.S. 96 (1963), made clear that the individual state's power began with "execution and application" of an offending union security agreement. What state law reaches and prohibits or regulates within the outer perimeters set by federal law must be decided by state courts. *N.L.R.B. v. General Motors, supra.*

8. Neither the National Labor Relations Act, the Taft-Hartley amendments, nor any other federal legislation has operated to preempt the provisions of the Colorado Labor Peace Act regulating union security clauses as "all-union" agreements requiring an "all-union" referendum as a prerequisite to their validity. Union security agreements requiring "membership" in a labor organization, regulation of which is preserved to the states explicity by Section 14(b) of the Taft-Hartley Act and implicitly by the Wagner Act, are the same agreements conditioning "membership" on the payment of uniform dues and initiation fees described by Section 8(a)(3) of the National Labor Relations Act. *Retail Clerks v. Schermerhorn, supra.* The State of Colorado retains jurisdiction to prohibit or regulate all such union security clauses beginning with their "actual negotiation

and execution." *Id.* The Colorado Supreme Court in *United Mine Workers v. Golden Cycle Corp.*, 134 Colo. 140, 300 P.2d 799 (1956), also concluded that resolution of the question of the union security had always been left totally to the states, including the State of Colorado, and that the State of Colorado had chosen to regulate union security through the vehicle of the Colorado Labor Peace Act.

9. Using the Wagner Act as its example, Wisconsin enacted an Employment Peace Act in 1935, and Colorado's Labor Peace "was patterned on, and followed closely . . ." that act. *Denver Milk Producers v. Teamsters*, 116 Colo. 389, 183 P.2d 529, 547 (1947). As *American Federation of Labor v. Reilly*, 113 Colo. 90, 155 P.2d 145 (1944) made clear, Wisconsin decisions under that act are highly persuasive and to be followed by Colorado courts in construing the Labor Peace Act. The Colorado General Assembly presumably was aware of the extant federal legislative history and congressional viewpoint and preference when it followed Wisconsin's lead in 1943 and began to regulate union security by enacting the Colorado Labor Peace Act. Presumably and evidently, that General Assembly exercised its power over labor-management relations to the fullest possible extent and did *not* begin from the mistaken premises, either that the N.L.R.B. had exclusive jurisdiction over labor relations or that Congress had preempted the power of the State of Colorado to regulate and control union security. Since congressional labor policy sanctioning state control of all union security devices has never changed, nothing further can be inferred from the date of passage. This court cannot conclude that the Colorado legislature intended to restrict the purview of state influence to only the union shop nor condone the view that it intended to abandon the rights of workers in this state guaranteed in § 80-4-4 of the Labor Peace Act just because § 14(b) of the Taft-Hart-

ley Act was not yet on the books, especially since there is no extant legislative history of the Labor Peace Act.

This court draws comfort from the fact that the U.S. Supreme Court reached the same conclusion in 1949 when it reviewed the Wisconsin statute under both the original Wagner Act and under § 14(b) of the Taft-Hartley amendments. It concluded as had the Wisconsin Employment Relations Board and Wisconsin state courts that § 14(b) changed nothing and that the states had always been free to regulate any form of union security under the Wagner Act. *W.E.R.B. v. Algoma Plywood & Veneer Co., supra.* That court considered the form of union security or the name the parties gave it irrelavant to determining the scope of state power, and since that date it has declined consistently to use the preemption doctrine to withdraw from consideration any specific devices compelling membership in a labor union. *E.g., Motorcoach Employees v. Lockridge,* 403 U.S. 274 (1971). Accordingly, this court chooses to follow the rationale of the foregoing decisions and holds that in conformity with the original Wagner Act, as clarified by § 14(b), Colorado is free to regulate as an "all-union" agreement any union security clause contained in any collective bargaining agreement as long as the clause contains any mandate which compels an employee's financial support or allegiance to the labor organization regardless of name, including, but not limited to, the union shop, agency shop, modified union shop, modified agency shop, discriminatory hiring halls, maintenance of dues, maintenance of membership and the like. *Compare Radio Officers' Union, C.T.U. v. N.L.R.B.,* 347 U.S. 17 (1954), *with N.L.R.B. General Motors,* 373 U.S. 743 (1963). As in Wisconsin, the true reason is not the Colorado Labor Peace Act's fundamental purpose, declared in C.R.S. § 80-4-4 (1963), is to protect the rights of *each* employee to engage in or refrain from activities in support of *any* labor organi-

zation unless and until three-quarters of the employees affected in a craft or establishment vote by a secret ballot to require membership in a labor organization as a condition of employment in an all-union referendum. *See* C.R.S. 80-4-6 (1963). Those rights cannot be fully protected unless the Labor Peace Act is construed broadly in that manner.

10. The provisions of the Colorado Labor Peace Act, C.R.S. § 80-4-1 *et seq.* (1963, as amended) apply to union security clauses in collective bargaining agreements negotiated by multi-state employers engaged in interstate commerce and doing business within the state of Colorado and to national labor organizations whenever the collective bargaining agreement in issue is applicable to a local union operating or headquartered within the State of Colorado. *Allen-Bradley Local No. 1111 v. W.E.R.B.*, 315 U.S. 740 (1942). The Colorado Supreme Court reached the same conclusion in *American Federation of Labor v. Reilly*, 113 Colo. 90, 115 P.2d 145 (1945). To rule otherwise in this case would invalidate *sub silentio* the congressional intent implicit in the Wagner Act and Section 14(b) of the National Labor Relations Act and render impotent the power of the State of Colorado validly exercised in the Colorado Labor Peace Act to regulate union security and to preserve the rights of employees within the boundaries of the State of Colorado. No such conclusion was intended by the drafters of the Wagner Act, and therefore, this court concludes that the Colorado Labor Peace Act is applicable to collective bargaining agreements, including those in issue here, executed between employers and labor organizations subject to the National Labor Relations Act in all areas, including union security, reserved specifically to the states by the National Labor Relations Act.

To construe the Colorado Labor Peace Act generally in any other manner would sanction a niggardly view incon-

sistent with the liberal construction of the Act mandated by the legislature in C.R.S. § 135-1-212 (1973 Supp.) and incompatible with full enforcement of the objectives the Act and the clear legislative purpose of preservation of worker rights as noted above. C.R.S. § 135-1-203(1)(a), (g). Likewise, construing the Act very narrowly to exclude all but union shop clauses applicable to intrastate employers would render the Act essentially a nullity, an effect at variance with the legislative directive to this court to reach "a just and reasonable result". C.R.S. § 135-1-201(c).

11. Since federal law defines nothing more than the outermost perimeter of state regulation—that no one may discriminate in terms of employment by use of any union security device which requires an employee to do more than tender to the union these dues and initiation fees uniformly required of all other employees as a condition of obtaining employment, beginning thirty days after employment—this court now must look to the exact provisions of the Labor Peace Act, viewed liberally, C.R.S. § 135-1-212, with an eye to fulfilling its lawful objects and legislatively declared purposes. C.R.S. § 135-1-2-3(1)(a), (g). To properly complete that task requires this court not only to consider the plain meaning of the statute, C.R.S. § 135-1-101, but also the true meaning of those "words and phrases that have acquired a technical or particular meaning . . . ." *Id.*

12. The Colorado Labor Peace Act's fundamental purpose is to protect the right of each employee to determine for himself whether or not to engage in labor matters or associate himself with a labor organization. The most crucial section of the law is C.R.S. § 80-4-4 which guarantees those rights, declares them "essential" and adopts a policy of *strict construction* of all other provisions of the Act when possibly applied in derogation of those basic rights. It states:

> "80-4-4. Rights of Employees.—In accordance with the provisions of this article, employees shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own free choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection. Such employees and each of them shall also have the right to refrain from any or all of such activities. Such rights of employees and each and all of them are essential rights and nothing hereinafter contained shall be so construed as to infringe upon or have any operation as against or in conflict with such rights and each and all of them."

The Act is replete with specific policy declarations by the legislature in favor of those rights as found in C.R.S. § 80-4-4 and specific provisions designed to implement and protect them. Section 80-4-1 contains a declaration of policy for labor relations in Colorado and recognizes in subsection (2) thereof the interests of the public, the employee and the employer. It continues in subsection (3),

> "[t]hat whatever may be the rights of disputants with respect to each other in any controversy regarding employment relations, *they should not be permitted, in the conduct of their controversy, to intrude directly or indirectly into the primary rights of third parties to earn a livelihood . . . by any lawful means and free from molestation, interference, intimidation, restraint or coercion.*

Subsection (4) requires that the terms and conditions of work result from "voluntary agreement between employer and employee." That does not mean a union rather than an employee because the same subsection states that each em-

ployee "has the right, if he desires, to associate with others [for collective bargaining purposes] without intimidation or coercion from any source." Subsection (5) recognizes the essential right of secret vote by the worker and that each employee "should have the right to *elect officers* by *secret ballot and to determine and vote* upon the question of striking or not striking or *other questions of policy* affecting the entire membership."

Section 80-4-2(7)(c) declares, in an unusual provision, that the discharge of an employee constitutes a labor dispute "*when such discharge or refusal to employ is founded upon membership in a union or labor organization.* . . ." Furthermore, C.R.S. § 80-4-16(2) prohibits Colorado courts from issuing an injunction restraining a person from "ceasing . . . to perform any work or to remain in any relation of employment," or "becoming or remaining a member of any labor organization or of any employer organization. . . ." C.R.S. § 80-4-16(3). Section 80-4-17 likewise is crucial, for the legislature chose to *restate* and *reiterate* the policy declarations of C.R.S. § 80-4-1, *supra*. That section points out that every undertaking or promise of any kind or type between an employee and an employer whereby he agrees to join or remain a member of either, "*are hereby declared to be contrary to public policy* and shall not afford any basis for the granting of legal or equitable relief of any court against a person or party to such undertaking or promise." Each of those rights is spelled out specifically in C.R.S. § 80-4-17(b), (c) and (d).

Any violation of employee rights as delineated above is declared by C.R.S. § 80-4-6(2)(b) to be an unfair labor practice. That provision clearly refers not only to the right to join or not to join a labor organization, but each individual employee's right to vote on all matters affecting his membership in a labor organization.

Colorado has chosen the strongest possible language to protect the individual employee's rights, and this Court must, by legislative mandate, consider this controversy against that policy backdrop. Adding and categorizing each such right individually and repetitively and prohibiting *specifically* not only employer and union, but also any public action, designed to infringe upon those "essential rights" of C.R.S. § 80-4-4 establishes that every employee in Colorado has at least the same rights as do employees in "right-to-work" states to engage in or refrain from union activity, and each employee must be accorded the same basic opportunity to determine the type of organization, if any, he wishes to join. Thus, while a bargaining agent may be certified as "exclusive" under federal law, that does not mean an employee loses his freedom to join that union, another union or no union. That right is guaranteed each worker, not just some, and not just those who have worked for one employer a long time. The fact that those statutory provisions are even somewhat redundant demonstrates the extreme concern of the Colorado General Assembly to ensure that each employee is given every option and complete freedom of choice in labor matters.

13. Colorado does provide one exception. If three-quarters of all the employees in a bargaining unit want a union security clause that requires them and others to become or remain members of one that specific union, or pay a sum equivalent in dues to that specific union, such a clause may be legalized by an affirmative vote of three-quarters of their number and formalized between the union and employer in an "all-union agreement."

An all-union agreement is defined as

> an agreement between an employer and a collective bargaining unit representing *some or all of his em-*

> *ployees*, whereby all of the employees of an employer in a craft or an establishment are required to be members of a single labor organization. C.R.S. § 80-4-2(8) (1963).

Unquestionably, that language is somewhat ambiguous. By plain meaning the union need only represent "some" employees and, perforce, those employees are free to join another union until the existing union wins an "all-union" referendum. What employees must then become members of that union are those in the same "craft" or "establishment." A craft is composed of people who use similar skill and training to perform work of a similar character. *See Switchmen's Union of North America v. National Mediation Bd.*, 135 F.2d 785, 793 (D.C. Cir. 1943). An establishment is any thing or entity which has become permanently founded. *See Webster's New World Dictionary*, p. 497 (1957 ed.) The latter, thus, is broader than merely a collective bargaining unit and includes not only the plant or factory, but also any certified, existing union to which employers may belong. Considering those meanings in light of legislative policy and existing federal law leads irresistably to the conclusion that each clause in issue is an "all-union" agreement because it compels employees of defendants to be members, i.e., pay dues, to one single labor organization and none other than plaintiff.

14. An "all-union" agreement may be executed between an employer and a union that represents only some of its employees. If the union represents only some of its employees, another union may represent other employees, and there may be two or more N.L.R.B. certified bargaining representatives for different groups of employees. Section 80-4-5(1), which deals with bargaining representatives and elections, states:

> A unit chosen for the purpose of collective bargaining shall be the exclusive representative of all of the employees in such unit, provided the majority of the employees of one employer, or the majority of the employees of one employer *in a craft*, vote at such election. . . .

Thus, our legislature has said that the collective bargaining representative need represent only a small segment of all the "employees." Also, in that provision it carefully excluded the word "establishment." Since there may be more than one union, each of which represents only a portion of the employees of an employer, and different recognizable groups of employees, it follows from that and from the definition of the word "establishment" that an all-union agreement covers not only certain segments of the employers plant, but also any recognizable "craft" group of employees and the local unit of the labor organization.

Thus, an "all-union"agreement is any union security clause negotiated and executed between an employer and a local union which requires "all" the employees of that employer who are "members" of that local union, or included in a recognized and defined employee group, to become and remain members of that one certified union, rather than any other, and to maintain their membership in that union by contributing financial support in the form of dues payments. The Colorado Labor Peace Act covers every kind of union security device, as long as some employees are required to continue their "membership" and financial support of that labor organization regardless of their wishes. That conclusion also is mandated by C.R.S. § 80-4-4, which guarantees every single Colorado employee freedom of choice and accords each worker's rights a status paramount to the interests of either labor, management, or the public. For this court to hold otherwise would be to sanction per-

version of legislative policy by allowing most workers' rights to be disregarded any time any one employee was excluded from any union security clause. That would be precisely what this court would have to do here. This court believes the Colorado legislature fully intended to guarantee all workers the right to join *and later quit* any labor organization until those workers themselves by secret ballot take that right away, and it will not subvert that right. That is the only reasonable and liberal construction possible which effectuates the Act's policy in C.R.S. § 80-4-4 of guaranteeing freedom of choice. That conclusion also is consistent with the United States Supreme Court's affirmance of the Wisconsin Supreme Court's determination that a maintenance of membership clause applicable only to existing employees violated Wisconsin law when its statutory language was the same as Colorado's and in the absence of an "all-union" referendum. *W.E.R.B. v. Algoma Plywood & Veneer Co., supra.*

Furthermore, neither in Wisconsin nor in Colorado does the "all-union" agreement proviso change the philosophy of the act to guarantee employees' freedom of choice; rather it provides an additional manifestation of the right of free choice, for if employees desire a union security clause, their rights to engage in or refrain from union activity dictate that they should also have that right. The sole additional mandate set by the legislature arises because of its preference, expressed again and again, in favor of each employee's freedom from coercion of any kind, and its statement in C.R.S. § 80-4-4 that employee rights are "essential." Approval of any union security device in derogation of those rights must be strictly construed and carefully scrutinized to ensure that it complies with the statute. *Id.* Otherwise, the mandate of employee freedom expressed in the Colorado Labor Peace Act would be frustrated.

15. A negotiated "all-union"agreement is invalid in the absence of the referendum specified in C.R.S. § 80-4-6(1)(d), which declares it to be an unfair labor practice for an employer:

> . . . to encourage or discourage membership in any labor organization . . . by discrimination in regard to hiring [or] tenure . . .' except that an employer shall not be prohibited from entering into an all-union agreement with representatives of his employees, *in the collective bargaining unit, where three-quarters or more of his employees shall have voted affirmatively by secret ballot in favor of such all-union agreement in a referendum conducted by the Director.*

Without that secret vote of affected employees, which is also declared essential by C.R.S. § 80-4-1, it is an unfair labor practice to encourage or discourage membership in any labor organization, C.R.S. § 80-4-6(1)(c), and is specifically declared to be contrary to the public policy of Colorado by C.R.S. § 80-4-17. Thus, until an election is held and such an "all-union" agreement is approved by three-quarters of the employees voting, *all* union security provisions of any kind, including the union shop, agency shop, maintenance of dues or membership, are illegal and void in Colorado and in contravention of the carefully protected rights of employees to chart their own course in labor matters in negotiations with their employer.

16. In the absence of an "all-union" referendum the Colorado Labor Peace Act prohibits entirely all union security devices and constitutes the legal equivalent of a right-to-work law, which also protects employees' right to engage in or refrain from collective activity. Judicial precedent from "right-to-work" states establishes that all union security devices including union shop, agency shop, modified

union shop, modified agency shop, discriminatory hiring halls, maintenance of dues, and maintenance of membership are illegal and prohibited in all circumstances if they compel in any manner an employee's financial support or allegiance to a labor organization. *Compare Local Union No. 438 v. Curry*, 371 U.S. 542 (1963); *and Higgins v. Cardinal Mfg. Co.*, 188 Kan. 11, 360 P.2d 456, *cert. denied*, 368 U.S. 829 (1961); *with Amalgamated Association of Street, Electric, Railway & Motorcoach Employees v. Las Vegas—Tonopah—Reno Stagecoach Line, Inc.*, 202 F. Supp. 726 (D. Nev. 1962), *aff'd* 319 F.2d 783 (9th Cir. 1963) and *Retail Clerks International Association v. Schermerhorn*, 373 U.S. 746 (1963). In Colorado, however, union security is prohibited *until* the "all-union" referendum is had and won by the union; then and only then may an employee's "right-to-work" be controlled by union security clauses. Colorado thus has a modified right-to-work act and in the absence of the all-union referendum, precedent from right-to-work states is equally compelling here.

17. Although the Colorado Supreme Court has not squarely defined the reach of "all-union" agreements, its enunciation of policy underlying the Labor Peace Act support this court's view. It has emphasized and approved the legislature's declared public policy of protecting employer/employee rights and has declared illegal any and all union security agreements in the absence of the "all-union" referendum. In *Bowers v. Teamsters, No. 17, Civil Action No. B-7920*, (Dist. Ct. February 17, 1956) (McWilliams) the court was called upon to consider the validity of union picketing designed to induce an employer to sign an "all-union contract", requiring employees to become union members within thirty days or lose their jobs. The sole question before the court was whether the union by its acts and conduct had violated the Colorado Labor Peace Act. Emphasizing the public policy embodied in C.R.S. §§ 80-4-1, -4-17,

supra, the court stated that the union was attempting to do indirectly what it could not do directly by trying to require the employer to sign a contract containing the questioned clause before the employees had voted in a representational election for the union. The court found that the rights of the employees to join or refrain from joining a union had been ignored. The Court emphasized that the union had a viable, lawful manner in which to obtain the right to represent those employees by following the relevant provisions of the Colorado Labor Peace Act, and that attempting to obtain that "coercive right" by any other means was *prohibited* by the Labor Peace Act in Colorado. Its determination was based upon what is now C.R.S. §80-4-4, which protects and guarantees certain rights to employees, and § 80-4-6(c) (e) which declares improper an all-union agreement unless the statutory election is had. In conclusion, the court found the picketing unlawful and issued an injunction.

In so ruling, the *Bowers* court relied upon *Meat Cutters v. Green*, 119 Colo. 92, 200 P.2d 924 (1948), in which the union had lost a representational election and then threatened to close the employer's business operation unless he entered into a contract requiring all his employees to become union members. Although the decision turned on whether there was "a labor dispute" involved, the Supreme Court indicated that had the employer consented to the union security clause demanded by the union, *the result would have meant that those of his employees who had expressly indicated their desire not to have union representation would have been forced to join the union or be discharged.* In crucial language, the court stated:

> If, under the conditions here, Green had signed the contract which the secretary and business agent of the union was insisting should be executed by him,

> he would have been guilty of a violation of section 6(1)(a), and section 6(1)(c), and section 6(1)(3), of the Labor Peace Act, and his action would have constituted an unfair "labor practice," for which he would have been amenable in civil and criminal actions. 119 Colo. at 105-06.

For Green to have entered into the agreement proposed without a referendum would have violated the Colorado Labor Peace Act because he would have prevented his employees from exercising their right of free choice to join a labor organization and committed an unfair labor practice. That case expressly recognizes that an "all-union" referendum, won by the union is a condition precedent to execution or enforcement of any union security agreement. Without it, any union security device is illegal and the employer, the employee, and the union are subject to criminal as well as civil sanctions. *Accord, Denver Milk Producers Inc. v. International Brotherhood of Teamsters Union*, 116 Colo. 398, 183 P.2d 529, 547 (1947); *see also, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers v. Publix Cab Co.*, 119 Colo. 208, 202 P.2d 154 (1949). Most crucial to this court is the emphasis on employee rights.

Perhaps the case most clearly in point in Colorado is *Barbers Union v. Industrial Commission*, 128 Colo. 121, 260 P.2d 941 (1953), in which the union tendered a contract which would require an employer and his employees to become members of the union so that he could continue to display a union shop barber card in his window. No referendum was conducted. Since there had been none, the court concluded that the union did not have the right to require the employer to agree to such a clause, even though it accorded him a special "limited membership," and held that the union's action was opposed to the public policy of the

state of Colorado as declared by the legislature in the Labor Peace Act. Again, our Supreme Court relied upon the declaration of employee rights and public policy as enunciated in C.R.S. § 80-4-1. Also, it characterized the union demand as an unfair labor practice under C.R.S. § 80-4-6(1)(b), (d), (f), because no referendum and concomitant affirmative approval by three-quarters of the employees appeared of record. What the court considered most crucial was that the union proposed to require something which had been declared prohibited and in violation of legislative intent, as recognized by Colorado courts relying upon Wisconsin precedent. The court also emphasized that the union was attempting to eliminate the employer's right to vote and compel him to become a member of a labor organization without exercise of that right, *stating that the right to vote was an essential element of a man's ability to join or not to join a labor organization or become a full member thereof:*

> In the consideration of statutes, courts are not guardians of the rights of the people except as those rights are secured by constitutional provision, and if a statute does not offend the Constitution, it is the duty of courts to carry it into execution according to its true intent and purpose. 'It cannot pass upon its expediency or policy; those are questions upon which the legislature has passed, and its judgment cannot be reviewed by the courts.' 128 Colo. at 134.

See also United Mine Workers v. Golden Cycle Corp. 134 Colo. 140, 300 P.2d 799 (1956), in which the court characterized the union's efforts to obtain an all-union contract without a proper election as illegal. The provisions of the Colorado Labor Peace Act specifically were declared constitutional in *American Federation of Labor v. Reilly*, 113 Colo. 80, 155 P.2d 145 (1944).

The last case worthy of note is *Pueblo Building & Construction Trades Council v. Harper Construction Co.*, 134 Colo. 469, 307 P.2d 468 (1957), in which the trial court's grant of an injunction against a labor union was reversed. There appeared to be only one picket in this case, and there was no indication that the union was attempting to require the execution of a labor contract containing a union security clause without first conducting a referendum. In fact, the court distinguished its prior actions in the *Denver Milk Producers* and *Green* cases, *supra*, by noting that, "in each of these cases the court determined that the union was picketing for an unlawful objective [i.e. the execution of a union security clause without the necessary referendum under state law]." 134 Colo. at 479. In that language, the court again indicates the need for an "all union" referendum as a prerequisite to the validity of a union security clause.

The import of the foregoing cases is clear to this court. The Colorado Labor Peace Act protects fundamentally each worker's free choice to join, refrain from joining, or quit a labor organization. Any contract clause which interferes with that right must be "strictly construed" as in derogation of those rights. C.R.S. § 80-4-4. Thus, while the precise holdings of those cases are not important, the objective and policy of the Colorado legislature as clarified therein is, and must guide the resolution by this court of the present controversy.

18. *Building Construction Trades Council, A.F.L. v. American Builders, Inc.*, 139 Colo. 236, 337 P.2d 953 (1959), does not compel a different conclusion or approach. In that case—decided prior to either of the *Schermerhorn* decisions the *General Motors* decision and *Local No. 438 v. Curry*, 371 U.S. 542 (1963)—the Colorado Supreme Court reversed a district court decision granting an employer an

injunction against a union to restrain its members from peaceful picketing in an effort to compel non-union employees to join the union, contrary to provisions of the Colorado Labor Peace Act dealing with "all-union" agreements. The decision recognized that § 14(b) sanctions state "right-to-work" laws but does not apply to such picketing situations. The specific basis of decision was that the conduct complained of arguably was an unfair labor practice under the N.L.R.B. and so Colorado courts were without jurisdiction to proceed in the absence of a cession of jurisdiction by the Board, and has no powers of enforcement. *Contra, Retail Clerks v. Schermerhorn, supra,* 375 U.S. 96 (1963), holding that state power over union security agreement begins with their "execution and application." In *dictum,* Stating Colorado had no "right-to-work" law, the Colorado Supreme Court erroneously assumed that the same principal restricting state power over peaceful picketing would govern cases in which a state sought to regulate union security devices permissible under federal law, a power preserved to the states since the 1935 Wagner Act, and confirmed by § 14(b).

What the court failed to recognize was that enjoining peaceful picketing and regulating union security are subject to divergent treatment under federal law. Preemption applies in the former: but because of the congressional philosophy of the Wagner Act and statutory codification in § 14(b), it does *not* in the latter circumstance. Preemption applies to *union* rights, but not to *employee* rights. In the sense that the court recognizes the vitality of § 14(b), at least in *per se* right-to-work states, it was correct; but it is patently *wrong* in the statement that §14(b) applies only when a union security agreement cannot be executed or applied in any circumstances. Ten years earlier, *Algoma Plywood & Veneer Co. v.* W.E.R.B., ruled that under § 14(b), states could *prohibit* as well as *regulate* the appli-

cation of union security agreements and that no federal preemption was involved in those circumstances. *See also, N.L.R.B. v. General Motors and Retail Clerks v. Schermerhorn, supra.* That oversight may be excused because it was not until the second *Schermerhorn* decision, 375 U.S. 96 (1963), that the United States Supreme Court defined specifically the limits of state action: § 14(b) empowers the states to act after the execution and application of the union security agreement, i.e., after the union writes it and attempts to enforce it. If the union pickets before to obtain such a clause, its rights are protected under federal law. It has no concomitant "right" in Colorado to coerce workers' choice. Consequently, this court declines to use that case as the basis of a binding interpretation of the Labor Peace Act.

19. Also inapplicable to the present controversy are cases considering clauses which do not embody the "practical equivalent of compulsory unionism" and which are not involved in the present controversy, such as check-off authorizations, in which state law is preempted by § 302 of the Landrum-Griffin Act of 1959 and nondiscriminatory hiring halls. *E.g., N.L.R.B. v. Houston Chapter, Associated General Contractors,* 349 F.2d 449 (5th Cir. 1965), *cert. denied,* 382 U.S. 1026 (1966); *Sea-Pak v. Professional Employees,* 300 F. Supp. 1197 (S.D. Ga. 1969), *aff'd.,* 423 F.2d 1229 (5th Cir. 1970), *aff'd.,* 400 U.S. 985 (1971). The clauses before the court all involve "the practical equivalent of compulsory unionism—" the payment of money to a labor organization, and, hence, they are legally and factually distinguishable.

20. Colorado regulates all union security devices requiring "membership" in a labor organization as that term is defined by Section 8(a)(3) of the National Labor Relations Act, including but not limited to the union shop, the

agency shop, maintenance of membership, maintenance of dues and modified agency shop provisions. Article 24 of Contract CWA-12; Article 23 of Contract CWA-JC-12; Article 24 of Contract CWA-13; Article 23 of Contract CWA-JC-13 and all Mountain Bell clauses noted above are union security clauses subjected to state regulation by the Wagner Act and § 14(b) and "all-union" agreements within the meaning of the Colorado Labor Peace Act because they require that existing union members, all transfers into the bargaining unit, and all newly hired employees make periodic dues payments to one union—the Plaintiff. That is an "establishment" within the meaning of C.R.S. § 80-4-2(8). Furthermore, except for an insubstantial and no longer applicable ten day escape clause, (which never existed in fact for 1971 contracts), each absolutely prevents all covered employees from withdrawing from the union and *compels* them to pay dues for up to two years from the time they enter the bargaining unit regardless of their wishes or desires. No one can now withdraw from the union whether he wants to or not. That is contrary to Colorado law. In the absence of such an "all-union" agreement, employees in Colorado, as noted above, are guaranteed the right to determine whether to support a labor organization at all times by C.R.S. § 80-4-4, and that includes the freedom to withdraw from union activity at any time. All those affected employees would lose their rights guaranteed by C.R.S. § 80-4-4 if Plaintiff's argument were to prevail. Those bargaining units members who utilized their statutory rights under C.R.S. § 80-4-4 to resign from plaintiff would now be required to join plaintiff and remain members or lose their jobs if they did not and the court decreed enforcement of the contract clauses in issue. A more blatant disregard of legislative direction and employee rights, the court cannot imagine! The simple fact is that there is no way now—and was none after July, 1971—for these employees to leave the union and keep their jobs under the clauses in issue. That the union has attempted

to apply that sanction under these same clauses is stipulated. To conclude that such a clause does not destroy employee freedom of choice and hence is not an "all-union" agreement is to ignore reality and the policy dictates of the legislature. Consequently, the Court concludes that each union security clause before the court is an invalid "all-union" agreement because no "all-union" referendum has been conducted pursuant to C.R.S. § 80-4-6(d).

21. Since Article 24 of CWA-12, Article 23 of CWA-JC-12, Article 24 of CWA-13, and Article 23 of CWA-JC-13 and the Mountain Bell clauses are illegal, invalid and prohibited by Colorado law, plaintiff may not rely upon the same to effect the discharge of any employee refusing to comply with the terms thereof, and for defendants Western Electric and Mountain Bell to enforce said contract clauses at the behest of plaintiff to terminate the affected employees would constitute unlawful discrimination in regard to the terms or conditions of said employees' employment and an unfair labor practice within the meaning of C.R.S. § 80-4-6(1)(d) of Colorado Labor Peace Act, as in contravention of essential employee rights of freedom of choice whether to join or support any labor organization. No employees of defendants Western Electric and Mountain Bell validly may be discharged pursuant to any of said contract provisions and said defendants lawfully refused the demand for discharge. For defendants to have enforced the clauses in issue against any employees failing to comply with their terms under present facts would have subjected them to additional civil and criminal penalties specified in the Colorado Labor Peace Act.

JUDGMENT

On the basis of the foregoing findings of fact and conclusions of law the Court declares and orders as follows:

(1) All contract clauses in issue and referred to above are declared to be illegal, invalid and unenforceable "all-union" agreements since no validating "all-union" referendum has been conducted by the Industrial Commission of the State of Colorado and approved by a three-quarters vote of the affected membership of plaintiff; and

(2) No employee of defendants Mountain Bell and Western Electric may be discriminated against by any party to the aforesaid collective bargaining contracts in controversy before this court in regard to any term, condition, or tenure of his or her employment for failing to comply with any of said union security clauses.

Dated at Denver, Colorado, this 9th day of September, 1974.

BY THE COURT:

DENVER DISTRICT JUDGE

APPENDIX B

No. 26651

and

No. 26797

Appeal From the District Court of the City
and County of Denver
Honorable James C. Flanigan, Judge

EN BANC JUDGMENT AFFIRMED

COMMUNICATIONS WORKERS OF AMERICA, an unincorporated labor association,

Plaintiff-Appellant,

v.

WESTERN ELECTRIC COMPANY, INCORPORATED, a New York corporation, STATE OF COLORADO, DEPARTMENT OF LABOR AND EMPLOYMENT, DIVISION OF LABOR, JAMES M. SHAFFER, Executive Director, State of Colorado, Department of Labor and Employment, Division of Labor, INDUSTRIAL COMMISSION OF THE STATE OF COLORADO, HENRY C. KIMBROUGH, in his capacity as a member of the Industrial Commission of the State of Colorado, ALBERT F. MANGAN, in his capacity as a member of the Industrial Commission of the State of Colorado, and KENNETH C. RUSSELL, in his capacity as a member of the Industrial Commission of Colorado, and THE MOUNTAIN STATES TELEPHONE & TELEGRAPH COMPANY, a Colorado corporation,

Defendants-Appellees.

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MR. JUSTICE ERICKSON delivered the Opinion of the Court.

This is an appeal by the plaintiff, Communications Workers of America (an unincorporated labor association, hereinafter referred to as C.W.A.) from an adverse decision of the District Court for the City and County of Denver. The defendants are the Western Electric Company, Inc., a New York corporation; the State of Colorado, Department of Labor and Employment, Division of Labor; James M. Shaffer, Executive Director of the Division of Labor; the Industrial Commission of the State of Colorado; Henry C. Kimbrough, Albert F. Mangan, and Kenneth C. Russell, members of the Industrial Commission; and the Mountain States Telephone & Telegraph Co., a Colorado corporation.

This appeal followed a determination by the district court of a consolidated action which was submitted as an agreed case and on stipulated records and evidence pursuant to C.R.C.P. 7(d). No significant issues of fact are in controversy. The relief prayed for was a declaration of the rights, status, and legal relations of the Communications Workers of America under certain union security provisions contained in collective bargaining agreements with the defendants Mountain States Telephone & Telegraph Co., and the Western Electric Co., Incorporated. The petitioner sought a declaration that the union security provisions were valid and enforceable in the absence of an "all-union" referendum conducted by the director of the Division of Labor.

The district court determined that declaratory relief, pursuant to C.R.S. 1963, 77-11-1,[1] *et seq*, was appropriate and concluded that the contested provisions of the various collective bargaining agreements were illegal, invalid, and unenforceable. *See also* C.R.C.P. 57. We affirm.

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[1] Now section 13-51-105, C.R.S. 1973.

The international headquarters of the plaintiff, C.WA., is located in Washington, D.C., and its principal place of business in Colorado is in Denver. Under certain collective bargaining agreements entered into in 1968 and 1971, C.W.A. became lawfully entitled to represent, as the exclusive bargaining agent, certain employees in the industrial field forces of the Service Division of Western Electric Company, Incorporated, in several states of the United States, including Colorado. C.W.A. is also, pursuant to other collective bargaining agreements, lawfully entitled to represent, as the exclusive bargaining agent, certain employees in the Plant and Traffic Departments of The Mountain States Telephone and Telegraph Company (hereinafter Mountain States).

In this appeal, seven collective bargaining agreements, with attendant union security clauses, are at issue. Three of these were entered into between C.W.A. and Mountain States and four were entered into between C.W.A. and Western Electric. The details of the contested union security clauses of the several collective bargaining agreements will be set forth in the text of this opinion.

On May 9, 1968, a collective bargaining agreement was entered into between C.W.A. and defendants, Mountain States and the Division of Labor, covering certain employees in the Plant Department of Mountain States. This agreement reads, in pertinent part:

> "2.1 The Company and the Union agree that they will not interfere with the rights of employees to join or refrain from joining the Union and agree that they will not in any manner, because of an employee's membership or nonmembership therein directly or indirectly discriminate against, interfere with, coerce,

restrain, discharge, demote, transfer, or discipline any employee.

. . . .

"14.1 Each employee who is a member of the Union on or after the 30th calendar day following the beginning of his employment, or on or after the effective date of this Agreement, whichever is the later, shall as a condition of employment pay or tender to the Union an amount equal to the periodic Union dues until the termination of this Agreement, except that each such employee may, within the 10-day period immediately preceding May 9, 1971, upon which date the Agreement terminates, terminate his obligation to tender periodic Union dues to the Union as a condition of employment by notifying both the Union and the Company in writing of his withdrawal from membership in the Union.

"14.2 Said condition of employment shall reapply to any such employee after his return to the bargaining unit following any transfer out of the bargaining unit, any removal from the payroll of the Company, or any leave of absence of more than one month's duration, provided such employee is a member of the Union on or after the 30th day following his return to the bargaining unit.

"14.3 The provisions of this Article shall not apply to any employee in any state in which the application of such provision would be inconsistent with the law of such State.

"14.4 The Company may inform employees and applicants for employment of their rights and obligations under the provisions of this Article."

On the same date, another collective bargaining agreement was entered into between C.W.A. and Mountain States and the Division of Labor covering certain employees in the Traffic Department of Mountain States, which provides:

> "1.1 The Company, its officers and supervisors, shall not interfere with the rights of employees to become and remain members of the Union and shall not in any manner, directly or indirectly, discriminate against, interfere with, coerce, restrain, discharge, demote, transfer or discipline any employee by reason of his or her membership or nonmembership in the Union.
>
> . . . .
>
> "ARTICLE 15
>
> "Section 1: Maintenance of Dues
>
> "1.1 Each employee who is a member of the Union on or after the 30th calendar day following the beginning of her employment, or on or after the effective date of this Agreement, whichever is the later, shall as a condition of employment pay or tender to the Union an amount equal to the periodic Union dues until the termination of this Agreement, except that each such employee may, within the 10 day period, immediately preceding May 9, 1971, upon which date the Agreement terminates, terminate his obligation to tender periodic Union dues to the Union as a condition of employment by notifying both the Union and the Company in writing of her withdrawal from membership in the Union.
>
> "1.2 Said condition of employment shall reapply

to any such employee after her return to the bargaining unit following transfer out of the bargaining unit, any removal from the payroll of the Company, or any Leave of Absence of more than one month's duration, provided such employee is a member of the Union on or after the 30th day following her return to the bargaining unit.

"1.3 The provisions of this Article shall not apply to any employee in any State in which the application of such provision would be inconsistent with the law of such State.

"1.4 The Company may inform employees and applicants for employment of their rights and obligations under the provisions of this Article."

During the term of the first two Mountain States collective bargaining agreements, numerous Colorado employees of Mountain States within the bargaining units covered by the foregoing agreements were members of C.W.A. Their membership was in effect on or after the thirtieth calendar day following the beginning of their employment or on or after the effective date of the agreement. Thereafter, several employees ceased paying or tendering to C.W.A. an amount equal to their periodic union dues. The payments were not ceased within the ten-day period immediately preceding the termination date of the applicable collective bargaining agreement, the "escape" period under the contracts.

On or about June 3, 1970, and again on or about September 3, 1970, C.W.A. demanded that Mountain States dismiss the employees who had ceased paying or tendering to the union an amount equal to their periodic union dues. C.W.A. alleged that the employees were in violation of the

contract provisions set out above. Mountain States refused to dismiss the employees contending that the above-cited provisions were not binding because of the provisions of the Colorado Labor Peace Act, C.R.S. 1963, 80-4-1,[2] *et seq* (as amended).

Another collective bargaining agreement was entered into between C.W.A. and Mountain States and the Division of Labor on or about the 18th of July, 1971. This agreement covered certain employees of the Plant and Traffic Department of Mountain States, and set forth:

> "2.1 The Company and the Union agree that they will not interfere with the rights of employees to join or refrain from joining the Union and agree that they will not in any manner, because of an employee's membership or nonmembership therein directly or indirectly discriminate against, interfere with, coerce, restrain, discharge, demote, transfer, or discipline any employee.
>
> . . . .
>
> "ARTICLE 21
>
> "Modified Agency Shop
>
> "21.1 Each regular employee who is a member of the Union on the date of ratification or approval of this agreement by the President of the Union, whichever is later, or who later becomes a member of the the Union and all regular employees hired on or after that date shall as a condition of employment pay or tender to the Union amounts equal to the periodic dues applicable to members for the period from such date

[2] Now section 8-3-101, C.R.S. 1973.

of ratification or approval or the date of later becoming a member or, in the case of regular employees hired on or after such date of ratification or approval, 30 days after hire, whichever of these dates is later until the termination of this contract, except that an employee may terminate this condition of employment by giving written notice to the Company and the Union of such termination, and, if applicable, his withdrawal from membership in the Union by registered mail, return receipt requested, and postmarked within the ten-day calendar period immediately preceding 11:59 P.M., July 28, 1971.

"21.2 Said condition of employment shall reapply to any such employee after returning to the bargaining unit following any transfer out of the bargaining unit, any removal from the payroll of the Company, or any leave of absence of more than one month's duration, provided such employee is a member of the Union on or after the 30th day following return to the bargaining unit.

"21.3 The provisions of this Article shall not apply to any employee in any state in which the application of such provision would be inconsistent with the law of such State.

"21.4 The Company may inform employees and applicants for employment of their rights and obligations under the provisions of this Article."

Defendant Western Electric Company Incorporated entered into a collective bargaining agreement with C.W.A. on May 1, 1968, covering certain communication equipment workers in the installation field forces of the Service Divi-

sion of Western Electric. This contract was denominated as Contract C.W.A.-12 and provides:

"ARTICLE 24

Maintenance of Union Dues

1. Each Employee who is a member of the Union:

(a) on or after the 30th calendar day following the beginning of his employment, or

(b) on or after the effect date of this contract

whichever is the latest, shall, as a condition of employment pay or tender to the Union an amount equal to the periodic Union dues until the final termination of this contract, except that each such Employee may, within the ten (10) day period immediately preceding the termination date of this contract, terminate his obligations to tender periodic Union dues to the Union as a condition of employment by notifying both the Union and the Company of his withdrawal from membership in the Union.

"1.1 Said condition of employment shall reapply to any such Employee after his return to the bargaining unit following any period of formal separation* therefrom, provided such Employee is a member of the Union on or after the 30th day following his return to the bargaining unit.

"2. The provision of this Article 24 shall not be

* Includes:
Transfers out of the bargaining unit. Removal from the payroll of the Company. Leaves of Absence of more than one (1) month duration.

effective if inconsistent with the law of the applicable State.

"3. The Company may inform Employees and applicants for employment of their rights and obligations under the provisions of this Article 24.

Because job clerks are also employed in the installation field forces of the Service Division of Western Electric, a separate collective bargaining agreement was entered into with C.W.A. on May 1, 1968, covering these employees, and denominated as Contract C.W.A.-JC-12, Article 23 of Contract C.W.A.-JC-12, states:

"ARTICLE 23

Maintenance of Union Dues

"1. Each Employee who is a member of the Union:

(a) on or after the 30th calendar day following the beginning of his employment, or

(b) on or after the effective date of this contract,

whichever is the latest, shall, as a condition of employment pay or tender to the Union an amount equal to the periodic Union dues until the final termination of this contract, except that each such Employee may, within the 10 day period immediately preceding the termination date of this contract terminate his obligation to tender periodic Union dues to the Union as a condition of employment by notifying both the Union and the Company of his withdrawal from membership in the Union.

"1.1 Said condition of employment shall reapply to any such Employee after his return to the bargaining unit following any period of formal separation* therefrom, provided such Employee is a member of the Union on or after the 30th day following his return to the bargaining unit.

"2. The provisions of this Article 23 shall not be effective if inconsistent with the laws of the applicable State.

"3. The Company may inform Employees and applicants for employment of their rights and obligations under the provisions of this Article 23."

During the term of these two collective bargaining agreements with C.W.A. numerous Colorado employees of Western Electric in the appropriate bargaining unit covered by the agreements were members of C.W.A. either on or after the thirtieth calendar day following the beginning of their employment or on or after the effective date of the applicable agreement. These employees ceased paying or tendering to the union an amount equal to their periodic union dues, and in each case, cessation did not occur within the "escape" period under the agreements.

On June 5, 1970, C.W.A. demanded of Western Electric that it take action under the two 1968 collective bargaining agreements and terminate Western Electric's employees. Western Electric replied that before an employer may enter into an agreement providing for union security in Colorado, the Industrial Commission of Colorado must certify that three-quarters or more of the bargaining unit

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* Includes:

Transfers out of the bargaining unit. Removal from the payroll of the Company. Leaves of Absence of more than one (1) month duration.

employees shall have voted affirmatively in a referendum in favor of such an agreement. A letter went on to describe Western Electric's position:

> ". . . since no such referendum has been conducted among the bargaining unit employees based in Colorado, it would violate Colorado law to condition the employment of these employees upon the payment of union dues. Accordingly, we must deny your request that the Company terminate the above-named employees because of their alleged failure to pay dues to the Union because the contract articles have no effect in light of the provisions of the Colorado Labor Peace Act, C.R.S. 80-4-1 (1963), et seq., as amended."

Contract C.W.A.-13 was entered into between Western Electric and C.W.A. in July, 1971, covering certain communication equipment workers of the installation field forces of the Service Division of the company. Article 24 of C.W.A.-13 provides, in pertinent part:

"ARTICLE 24

Union Security

> "1. Each Employee who is a member of the Union on the date of ratification or approval of this Contract by the President of the Communications Workers of America, whichever is later, or who later becomes a member of the Union and all Employees hired on or after such date shall as a condition of employment pay or tender to the Union amounts equal to the periodic dues applicable to members for the period from such date of ratification or approval or the date of later becoming a member or, in the case of Employees hired on or after such date of ratification or approval,

thirty (30) days after hire, whichever of these dates is later until the termination of this Contract, except that an Employee may terminate this condition of employment by giving written notice to the Company and the Union of such termination, and, if applicable, his or her withdrawal from membership in the Union, by registered mail, return receipt requested, and postmarked with the ten (10) day calendar period immediately preceding 11:59 P.M. July 27, 1971.

"2. The condition of employment specified in Paragraph 1 shall not apply during the periods of formal separation* from the bargaining unit by any such Employee but shall reapply to such Employee on the thirtieth (30th) day following his or her return to the bargaining unit.

The Company may inform Employees and applicants for employment of their rights and obligations under the provisions of this article.

"4. This article shall apply only in those States and the District of Columbia where the law permits the Union to enter into this type of union security agreement. If during the term of this Contract the Union shall become duly authorized under the laws of any other State to enter into this type of union security agreement, the effective date of this article as to Employees in such State shall be the date upon which the Company receives proper written evidence from the Union that it is fully qualified to enter into such an agreement in such State.

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* The term 'formal separation' includes transfers out of the bargaining unit, removal from the payroll of the Company, and Leaves of Absence of more than one (1) month duration.

Another collective bargaining agreement was entered at the same time as C.W.A.-13, covering job clerks employed in the installation field forces of the Service Division of Western Electric. This agreement was denominated as C.W.A.-JC-13. Article 23 of that agreement is relevant and provides:

"ARTICLE 23

Union Security

"1. Each Employee who is a member of the Union on the date of ratification or approval of this Contract by the President of the Communications Workers of America, whichever is later, or who later becomes a member of the Union and all Employees hired on or after such date shall as a condition of employment pay or tender to the Union amounts equal to the periodic dues applicable to members for the period from such date of ratification or approval or the date of later becoming a member or, in the case of Employees hired on or after such date of ratification or approval, thirty (30) days after hire, whichever of these dates is later until the termination of this Contract, except that an Employee may terminate this condition of employment by giving written notice to the Company and the Union of such termination, and, if applicable, his or her withdrawal from membership in the Union, by registered mail, return receipt requested, and postmarked within the ten (10) day calendar period immediately preceding 11:59 P.M., July 27, 1971.

"2. The condition of employment specified in Paragraph 1 shall not apply during periods of formal separation* from the bargaining unit by any such

* The term 'formal separation' includes transfers out of the bargaining unit, removal from the payroll of the Company, and Leaves of Absence of more than one (1) month duration.

Employee but shall reapply to such Employee on the thirtieth (30th) day following his or her return to the bargaining unit.

"3. The company may inform Employees and applicants for employment of their rights and obligations under the provisions of this article.

"4. This article shall apply only in those States and the District of Columbia where the law permits the Union to enter into this type of union security agreement. If during the term of this Contract the Union shall become duly authorized under the laws of any other State to enter into this type of union security agreement, the effective date of this article as to Employees in such State shall be the date upon which the Company receives proper written evidence from the Union that it is fully qualified to enter into such an agreement in such State."

An "all-union" referendum election under the provisions of 1969 Perm. Supp., C.R.S. 1963, 80-4-6(1)(d)[3] has not been held with respect to any of the collective bargaining agreements. The primary issue in this appeal is whether the provisions of the Colorado Labor Peace Act, C.R.S. 1963, 80-4-1, *et seq* (as amended), operate to preclude enforce-

[3] Section 80-4-6(1)(d) makes it an unfair labor practice:

"(1)(d) To encourage or discourage membership in any labor organization, employee agency, committee, association or representation plan by discrimination in regard to hiring, tenure, or other terms or conditions of employment; except that an employer shall not be prohibited from entering into an all-union agreement with the representatives of his employees, in a collective bargaining unit, where three-quarters or more of his employees shall have voted affirmatively by secret ballot in favor of such all-union agreement in a referendum conducted by the director. The director shall declare any such all-union agreement terminated whenever he finds that the labor organization involved unreasonably has refused to receive as a member any employee of such employer, and each such all-union agreement shall be made subject to this duty of the director. Any person interested may come before the director, as provided in section 80-4-8, as amended, and ask the performance of this duty.

ment of the union-security provisions contained in the various agreements.

The district court opinion recognized that federal law almost totally preempts state law in the area of labor relations, but that neither the National Labor Relations Act, 29 U.S.C. § 151, *et seq* (1964),[4] the Labor-Management Relations Act (hereinafter the Taft-Hartley Act)— see particularly 29 U.S.C. § 164(b) (1964)—nor any other federal law preempts the provisions of the Colorado Labor Peace Act regulating "all-union" security agreements, 1969 Perm. Supp., C.R.S. 1963, 80-4-6(1)(d). The district court concluded that section 80-4-6(1)(d)[5] of the Colorado Labor Peace Act prohibits "any union security clause contained in any collective bargaining agreement as long as the clause contains any mandate which compels an employee's financial support or allegiance to the labor organization regardless of name, including, but not limited to, the union shop, agency shop, modified union shop, modified agency shop, discriminatory hiring halls, maintenance of dues, maintenance of membership and the like" in the absence of a referendum election under the Colorado Labor Peace Act. The district court further found that this provision of the Colorado Labor Peace Act was applicable to employers engaged in interstate commerce doing business within the State of Colorado The court refused to construe the provision as covering only union shop clauses. Throughout the opinion, the court emphasized that the fundamental purpose of the Colorado Labor Peace Act was to protect the right of each individual employee to determine for himself whether or not to engage in union activity. In the absence of a referendum approving the agreement, the court held that any negotiated "all-union" security agreement was in-

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[4] Otherwise known as The Wagner Act.

[5] Now section 8-3-108(1)(c), C.R.S. 1973.

valid. The court also noted that the Colorado Labor Peace Act must be construed to allow employees the freedom to withdraw from union activity in the absence of the required referendum. On the basis of these conclusions of law, the district court declare that each of the disputed clauses here in issue was invalid and unenforceable because no all-union referendum had been conducted pursuant to 1969 Perm. Supp., C.R.S. 1963, 80-4-6(1)(d). Moreover, the court held that C.W.A. could not rely on the invalid clauses to effect a discharge of any employee refusing to comply with the terms thereof, and that the respondents lawfully refused the demands for the discharge of the employees.

All-Union Agreements

Plaintiff, C.W.A. argues that the union security clauses here in issue are not "all-union agreements" because "all" of the employees of the two employers are not required to be members of a single labor organization. Correlatively, C.W.A. argues that Colorado only proscribes the "closed shop" form of union security. We disagree.

An "all-union agreement" is defined in C.R.S. 1963, 80-4-2(8)[6] as:

> ". . . an agreement between an employer and a collective bargaining unit representing some or all of his employees, whereby all of the employees of an employer in a craft or an estabiishment are required to be members of a single labor organization."

C.W.A. emphasizes the use of the word "all" in the above definition and concludes that the present union security clauses are not subject to regulation since they do not require membership in C.W.A. by "all" of the respective employers' employees in a collective bargaining unit. Generally,

[6] Now section 8-3-104(1), C.R.S. 1973.

the instant union-security agreements fall into two categories: maintenance of membership agreements [the 1968 Plant Division and Traffic Department agreements between C.W.A. and Mountain States; and contracts C.WA.-12 and C.W.A.-JC-12 between C.W.A. and Western Electric]; and modified agency shop agreements [the 1971 Plant and Traffic agreement between C.W.A. and Mountain States; and contracts C.W.A.-13 and C.W.A.-JC-13 between C.W.A. and Western Electric]. Under neither of the above types of agreements were all employees in the affected bargaining units required to become members of C.W.A. Moreover, "escape" periods were provided in the agreements during which time employees could sever any obligation to retain membership and/or pay dues to C.W.A.

Generally, under a maintenance of membership provision, employees who have become members of the union are required to maintain their membership in good standing as a condition of employment. The escape clause may be utilized by the employees to renounce their membership. Under an agency shop agreement, non-union employees whom the union represents as part of the collective bargaining unit must pay, as a condition of their continued employment, an amount equivalent to the sums paid by union employees for initiation fees and dues. Union membership is not required by the agency shop agreement. The present agency shop agreements were modified as a consequence of the "escape" clause features of the contracts.

The interpretation of "all-union agreement" which C.W.A. advances would subvert important policy declarations embodied in the Colorado Labor Peace Act. C.R.S. 1963, 80-4-4,[7] provides that employees shall be free to join or refrain from joining or assisting labor organizations:

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[7] Now section 8-3-106, C.R.S. 1973.

> "Such rights of employees and each and all of them are essential rights and nothing herein contained shall be so construed as to infringe upon or have any operation as against or in conflict with such rights and each and all of them." C.R.S. 1963, 80-4-4.

This language evinces an intent on the part of the legislature to protect the working man's right to freely chart his own course with regard to labor organization activities. Section 80-4-6(1)(d) is a further manifestation of that legislative intent in that it severely restricts the circumstances in which an employee may be subjected to "all-union agreements." If C.W.A. were to prevail in its argument that only "closed shop" agreements are regulated by section 80-4-6(1)(d), no compulsory union provision would be subject to regulation as long as a single employee were exempt from compelled payment of dues or their equivalent. Under such circumstances, the union would be free to ignore with impunity the referendum provisions of the statute and also demand compliance with any union security device other than a closed shop agreement.

In view of the emphatic language contained in the legislative declaration of rights of employees, C.R.S. 1963, 80-4-4, regulation of "all-union agreements" is not limited to closed shop agreements. The fact that section 80-4-2(8) defines "all union agreement" in terms of a union "membership" requirement, and the agreements herein did not require "membership" *per se*, does not deter us from our conclusion. Compulsory monetary support of a union is the "practical equivalent" of compulsory membership. *Retail Clerks v. Schermerhorn*, 373 U.S. 746, 83 S.Ct. 1461, 10 L.Ed.2d 678 (1963); *see also NLRB v. General Motors Corp.*, 373 U.S. 734, 83 S.Ct. 1453, 10 L.Ed.2d 670 (1963). In our opinion, any financial obligation imposed upon employees pursuant to a collective bargaining agreement exe-

cuted and sought to be enforced in Colorado has features of compulsory unionism and as such is to be considered an "all-union agreement" under C.R.S. 1963, 80-4-2(8).

We interpret the word "establishment" in 80-4-2(8) to mean a recognized or defined group of employees, not necessarily *all* of the employees in a particular collective bargaining unit. The statute expressly states that the agreement may be between an employer and a collective bargaining unit representing "*some*" of his employees. Hence, the fact that some of the employees of Mountain States or Western Electric may not have been subject to the compulsory union-security provisions in issue does not exclude such provisions from regulation under 80-4-6(1)(d). Absent the requisite referendum, union-security clauses such as the ones here in issue are invalid and unenforceable under the Colorado Labor Peace Act. *But cf., Building Construction Trades Council, AFL v. American Builders, Inc.*, 139 Colo. 236, 337 P.2d 953 (1959).

Necessity of a "Collective Bargaining Unit"

The union-security provision of the Colorado Labor Peace Act, 1969 Perm. Supp., C.R.S. 1963, 80-4-6(1)(d), provides that encouragement of membership in a labor organization by discrimination "in regard to hiring, tenure, or other terms or conditions of employment" is an unfair labor practice. The statute, however, delineates an exception to the general rule:

> "... [A]n employer shall not be prohibited from entering into an all-union agreement with the representatives of his employees, *in a collective bargaining unit*, where three-quarters or more of his employees shall have voted affirmatively by secret ballot in favor of

> such all-union agreement in a referendum conducted by the director." [Emphasis added.]

C.W.A. contends that a "collectively bargaining unit" as defined by the Colorado Labor Peace Act is a condition precedent to the holding of a referendum under section 80-4-6(1)(d). In our opinion, the statute plainly directs that the referendum should be conducted among the employees of a collective bargaining unit. The Colorado Peace Act, C.R.S. 1963, 80-4-2(6),[8] defines "collective bargaining unit" as:

> ". . . an organization selected by secret ballot, as provided in section 80-4-5, by a majority vote of the employees of one employer employed within the state who vote at an election for the selection of such unit, provided that where a majority of such employees engaged in a single craft, division, department, or plant shall have voted, by secret ballot, that the employees of such single craft, division, department or plant shall constitute their collective bargaining unit, it shall be so considered. Two or more collective bargaining units may bargain collectively through the same representative or representatives where a majority of the employees in each separate unit shall have voted so to do by secret ballot, as provided in section 80-4-5."

All of the bargaining units involved in this appeal have been recognized or certified by the National Labor Relations Board, and no evidence suggests that any of them were established by a secret ballot election pursuant to section 80-4-2(6). In our view, a secret ballot election, as described by section 80-4-2(6), is the exclusive method by which a collective bargaining unit subject to the "all-union" referendum provisions of section 80-4-6(1)(d) may be

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[8] Now section 8-3-104(4), C.R.S. 1973.

recognized. Correlatively, we hold that a collective bargaining unit, as defined by section 80-4-2(6), is a condition precedent to any labor organization's right to enter into an all-union agreement with an employer under Colorado law. Inasmuch as no secret ballot election was conducted for the purpose of establishing a collective bargaining unit authorized to enter into an all-union agreement with Mountain States and Western Electric, C.W.A. is not entitled to the enforcement of the all-union agreements provisions which are, in our opinion, invalid. Even if such an election had been held and an appropriately authorized collective bargaining unit had been established, the union security provisions here in issue would be invalid and unenforceable because of the lack of employee approval through an all-union referendum.

Federal Preemption

C.W.A. urges that this court should declare section 80-4-6(1)(d) invalid on grounds of federal preemption. C.W.A. contends that the definition of "collective bargaining unit" defined by section 80-4-2(6), and operative in section 80-4-6(1)(d), is preempted by the definition of "collective bargaining unit" contained in section 9 of the National Labor Relations Act, 29 U.S.C. § 151, *et seq* (1964).

We agree that certification or recognition under the Federal Act is different than the recognition/definition section of the Colorado Labor Peace Act. The Colorado Labor Peace Act requires a secret ballot election conducted by the division of labor in which a majority of the employees of the employer or a majority of the employees in a craft must vote. In *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969), however, the Supreme Court of the United States recognized that the duty to bargain may

be established under the Federal Act by methods other than by a secret ballot election:

> "The most commonly traveled route for a union to obtain recognition as the exclusive bargaining representative of an unorganized group of employees is through the Board's election and certification procedures under § 9(c) of the Act. . . . A union is not limited to a Board election, however, in addition to § 9, the present Act provides in § 8(a)(5) . . . as did the Wagner Act in § 8(5), that '[i]t shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a). Since section 9(a) in both the Wagner Act and the present Act, refers to the representative as the one "designated or selected" by a majority of the employees without specifying precisely how that representative is to be chosen, it was early recognized that an employer had a duty to bargain whenever the union representative presented "convincing evidence of majority support."' Almost from the inception of the Act, then, it was recognized that a union did not have to be certified as the winner of a Board election to invoke a bargaining obligation; it could establish majority status by other means under the unfair labor practice provision of §8(a)(5)—by showing convincing support, for instance, by union-called strike or by strike vote, or, as here, by possession of cards signed by a majority of the employees authorizing the union to represent them for collective bargaining purposes."

No one disputes that the employers in this appeal are engaged in commerce and are subject to the various provisions of the National Labor Relations Act and the Labor-Management Relations Act of 1946, as amended, 29 U.S.C.

§ 141, *et seq.* The federal preemption doctrine was restated in *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 91 S.Ct. 1909, 29 L.Ed.2d 493 (1971), where the Supreme Court said:

> "The constitutional principles of preemption, in whatever particular field of law they operate, are designed with a common end in view: to avoid conflicting regulation of conduct by various official bodies which might have some authority over the subject matter."

The *Lockridge* case affirmed the principles established in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959), where the United States Supreme Court declared:

> "When it is clear or may fairly be assumed that the activities which a state purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the states free to regulate conduct to plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law."[9]

C.W.A. urges that the recognition or certification procedures outlined in section 80-4-2(6) of the Colorado Labor Peace Act are preempted by federal principles relating to recognition or certification of a collective bargaining unit. On this basis, C.W.A. contends that the utilization of the state certification procedures in the context of the state statute regulating union security provisions, 80-4-6(1)(d),

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[9] § 7, 29 U.S.C. § 157; § 8, 29 U.S.C. § 158.

renders the latter provision invalid and unenforceable. We need not speculate on the question of whether Colorado's procedures for establishing a collective bargaining unit are preempted by federal law in any context other than the one here in issue. We concern ourselves with the certification procedure only as it relates to the state's power to regulate union security clauses in collective bargaining agreements.

In that context, the policies embodied in the National Labor Relations Act and the Labor-Management Relations Act have been made expressly clear by the United States Supreme Court. The regulation of union security provisions is not a matter of exclusive federal concern, but states are free to pursue their own more restrictive policies. *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board*, 336 U.S. 301, 69 S.Ct. 584, 93 L.Ed. 691 (1949).

We recognize that section 8(a)(3) of the Taft-Hartley Act, 29 U.S.C. § 158(a)(d) (1964), disclaimed a national policy hostile to the closed-shop or other forms of union security agreement. *Algoma Plywood & Veneer Co., supra.*[10] Section 14(b), however, provided that:

> "[N]othing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in and State or Territory in which such execution or application is prohibited by State or Territorial law." 29 U.S.C. § 164(b).

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[10] Section 8(a)(3) reads as follows:

"It shall be unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: **Provided**, That nothing in this Act, or in any other statute of the United States shall preclude any employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when

According to *Algoma Plywood & Veneer Co., supra*, section 14(b) was included in the act to "forestall the inference that federal policy was exclusive in the matter of union security." *See also Retail Clerks Local 125 v. Schemerhorn*, 375 U.S. 96, 84 S.Ct. 219, 11 L.Ed.2d 179 (1963). *See generally, Oil, Chemical & Atomic Workers International Union, AFL-CIO, et al. v. Mobil Oil Corp., et al.*, ____ U.S. ____, 92 L.R.R.M. 2737 (June 14, 1976). State power, pursuant to § 14(b), begins with the actual negotiation and execution of the type of agreement described by § 14(b). *Retail Clerks Local 125 v. Schermerhorn, supra.* Negotiation and execution of the contested agreements between C.W.A. and Mountain States and between C.W.A. and Western Electric has occurred, and thus the state's power under § 14(b) has become operative.

The issue of a state's power to recognize or certify collective bargaining units must not be confused with the state's power to regulate union-security agreements. In *Algoma Plywood & Veneer Co., supra*, the United States Supreme Court held that "[t]he character of activities left to State regulation is not changed by the fact of certification." We agree. In Colorado, a "collective bargaining unit" for purposes of the union security agreement provision of the Colorado Labor Peace Act, may be something different than a collective barganing unit for other purposes of labor-management relations. In the context of section 80-4-6(1)(d), a collective bargaining unit is a unique entity

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made; and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: **Provided further**, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

which may only be established pursuant to the requirements of section 80-4-2(6). Viewed as such, the procedures for establishing a collective bargaining unit under the Colorado Labor Peace Act are merely an incident of the state's power to prohibit the application of union security agreements under the permissive grant of authority contained in § 14(b) of the Taft-Hartley Act. The application of section 80-4-2(6) to the union security provisions of the Colorado Labor Peace Act is severable from its application in other contexts of the Act.

A valid all-union agreement may only be entered after the establishment of a a collective bargaining unit in accordance with section 80-4-2(6). Having failed to properly define such collective bargaining units prior to entering the agreements here in issue, C.W.A. cannot properly demand that the employers enforce these invalid agreements.

Prohibition Under § 14(b)

C.W.A. contends that states, pursuant to § 14(b), are allowed to "prohibit" but not to "regulate" union security agreements. No matter how this distinction may be interpreted, § 14(b) does allow states to prohibit the "application" of union security agreements. In *Algoma Plywood & Veneer Co., supra*, the United States Supreme Court stated:

> "It is argued, however, that the effect of this section is to displace State law which 'regulates' but does not wholly 'prohibit' agreements requiring membership in a labor organization as a condition of employment. But if there could be any doubt that the language of the section means that the Act shall not be construed to authorize any 'application' of a union-security contract, such as discharging an employee, whch under

> the circumstances 'is prohibited' by the State, the legislative history of the section would dispel it. . . ."

See also Retail Clerks v. Schermerhorn, 375 U.S. 96, 84 S.Ct. 219, 11 L.Ed2d 179 (1963). The provisions of section 80-4-6(1)(d) are an important incident of the state's power to prohibit the application of union security provisions such as the ones here in issue. That power has not been supplanted by federal law.

The fact that § 14(b) refers to "membership" does not mean that state power to regulate union security agreements only extends so far as union or closed-shop agreements. *Retail Clerks Union v. Schermerhorn*, 373 U.S. 746, 83 S.Ct. 1461, 10 L.Ed2d 678 (1963), held that an agreement conditioning employment upon the payment of sums equal to intiation fees and monthly dues was within the § 8(a)(3) proviso, and within the scope of § 14(b), and, thence, subject to invalidation by state law. The Court, in *Schermerhorn I*, stated that whatever may be the status of "less stringent union-security arrangements, the agency shop is within § 14(b)." *NLRB v. General Motors Corp.*, *supra*. The modified agency shop clauses here in issue are hardly less stringent than the agency shop clause in the first *Schermerhorn* case. The limited "escape" provisions included in these agreements were of relatively inconsequential effect when measured against the more obvious purpose of the agreements—to insure C.W.A.'s security as the exclusive bargaining representative of the employees of Mountain States and Western Electric.

In short, Colorado was entitled under § 14(b) to enact section 80-4-6(1)(d) of the Colorado Labor Peace Act, and the state's power to prohibit the application of the union security provisions here in issue is not preempted by federal law.

The enactment of § 14(b) would have been a meaningless gesture unless it was designed to affect a state's power over employers and employees engaged in interstate commerce, and that is the only circumstance in which Congress could possibly have ceded power to the states under § 14(b). Therefore, section 80-4-6(1)(d) applies to union security clauses in collective bargaining agreements negotiated and executed by multi-state employers engaged in interstate commerce and doing business in Colorado.

Accordingly, we hold that the disputed clauses of the collective bargaining agreements between C.W.A. and Mountain States and between C.W.A. and Western Electric are union security clauses subject to state control under the Colorado Labor Peace Act. As enacted, the clauses were invalid because they were not approved through an all-union referendum by an appropriately designated employee group. C.W.A. may not rely on these clauses to effectuate a discharge of an employee refusing to comply with the terms thereof. Mountain States and Western Electric lawfully refused C.W.A.'s demand that the employees be discharged.

Accordingly, the judgment of the district court is affirmed.

MR. CHIEF JUSTICE PRINGLE dissents.

No. 26651 and No. 26797

Communications Workers of America

v.

Western Electric Company, et al.

MR. CHIEF JUSTICE PRINGLE dissenting:

I respectfully dissent. Since the overwhelming majority of this court feels differently than I do, I shall not write at length or in depth.

I think there is no disagreement that the National Labor Relations Act, as amended, pre-empts labor relations from state regulation except where such is specifically authorized by the Act itself. Section 14(b) of the Taft-Hartley amendment does provide that states may *prohibit*, and I emphasize the word used is *prohibit*, the execution or application of agreements requiring membership in a labor organization as a condition of employment in any state or territory. It does not, in its express language, allow states to regulate or do anything other than prohibit such agreements.

I would recall to the majority that Taft-Hartley was passed after a rather bitter battle, and that its terms therefore, should be strictly applied. It makes sense that the compromise was that union and agency shops may be entirely prohibited by a state, but if there was to be regulation, that regulation must be uniformly applied throughout the country under the terms of the National Labor Relations Act, rather than apply 50 different standards as to how and when union and agency shops might be negotiated.

I know the time-worn legal cliche that whatever a state can prohibit it can regulate. But this is not the situation for its application. We are here dealing with original pre-emption of the entire field by the federal government and the cession back to the states of a portion of that field. As I have pointed out, the history of that cession does not permit this court to reach out, as I think it does here, to grant the state powers not expressly given it by the Act itself. I do not read *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board*, 336 U.S. 301, 69 S.Ct. 584, 93 L.Ed. 691 (1949) to hold otherwise. I do read several National Labor Relations Board decisions to be in accordance with my view. *Cyclone Sales, Inc.*, 115 NLRB 431 (1956); *Western Electric Co.*, 84 NLRB 1019 (1949); *Northland Greyhound Lines, Inc.*, 80 NLRB 288 (1948).

APPENDIX C

Clerk's Office

SUPREME COURT
STATE OF COLORADO
Denver 80203

July 6, 1976

Case No. 26651 and 26797

Communications Workers of America

v.

Western Electric Company, et al

Mr. Clay R. Smith,
Mr. John W. McKendree,
Attorneys and Counselors,
1050 Seventeenth St., Suite 1818,
Denver, Colorado 80202

Gentlemen:

Please substitute the enclosed pages 1, 2, 18, 20, 21 and 28 for the like numbered pages of the opinion of the court filed in the above numbered and titled case on June 7, 1976. The opinion was modified and as modified the petition for rehearing and supplemental petition for rehearing were denied.

Yours very truly,

RICHARD D. TURELLI, Clerk

By Clarence Walsh
Deputy Clerk.

APPENDIX D

Nos. 26651 and 26797

IN THE
SUPREME COURT
OF THE
STATE OF COLORADO

COMMUNICATIONS WORKERS OF AMERICA, *Plaintiff-Appellant,* v. WESTERN ELECTRIC COMPANY, INC., et al., *Defendants-Appellees.*	Notice of Appeal to the Supreme Court of the United States

I. Notice is hereby given that the State of Colorado, Department of Labor and Employment, Division of Labor, Executive Director James M. Shaffer, the Industrial Commission of the State of Colorado, and Commissioners Henry C. Kimbrough, Albert F. Mangan and Kenneth C. Russell appeal to the Supreme Court of the United States from a final judgment of this court affirming the judgment of the District Court in and for the City and County of Denver. The district court's judgment was entered on September 9, 1974, and the judgment of this court was entered on June 7, 1976 and modified on July 6, 1976.

This appeal is taken pursuant to 28 U.S.C. § 1257 (2).

II. The clerk has transmitted the record in this case to the Clerk of the Supreme Court of the United States pursuant to the request of the Communications Workers of America filed on July 19, 1976. The state defendants request that the record on appeal be supplemented with this pleading.

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Supreme Court, U. S.
FILED
JAN 13 1977
MICHAEL RODAK, JR., CLERK

No. 76-478

In the Supreme Court of the United States

OCTOBER TERM, 1976

STATE OF COLORADO, DEPARTMENT OF LABOR AND EMPLOYMENT, DIVISION OF LABOR, ET AL., APPELLANTS

v.

COMMUNICATIONS WORKERS OF AMERICA, ET AL.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE

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In the Supreme Court of the United States

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STATE OF COLORADO, DEPARTMENT OF LABOR AND EMPLOYMENT, DIVISION OF LABOR, ET AL., APPELLANTS

v.

COMMUNICATIONS WORKERS OF AMERICA, ET AL.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE

This memorandum is submitted in support of the jurisdictional statement filed in this case by certain agencies of the State of Colorado. The State has presented to this Court the following question (J.S. 4-5):

> Does federal law preempt a state law which requires a secret ballot election to determine a collective bargaining unit as a condition precedent to the employee representative entering into a union security agreement when the National Labor Relations Board previously certified or recognized the appropriate collective bargaining unit for the employees involved?[1]

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[1] A companion case, raising this and other questions, is also pending before the Court. *Communications Workers of America* v. *Western Electric Company, et al.*, No. 76-459.

STATEMENT

The Communications Workers of America ("the Union") entered into collective bargaining agreements in 1968 and 1971 with Western Electric Company and the Mountain States Telephone & Telegraph Company, covering employees in multi-state bargaining units previously approved by the National Labor Relations Board (J.S. 58, 76). All of these contracts contained union security clauses requiring employees to pay the Union, as a condition of continued employment, amounts equal to periodic union dues.[2] During the terms of the 1968 contracts, certain Colorado-based employees covered by the union security provisions of the contracts ceased making payments to the Union, and the Union requested their discharge (J.S. 21-22). However, both Western Electric and Mountain States refused to discharge the employees on the ground that the union security arrangements had not been approved by at least three-fourths of the unit employees

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[2]The Union's two 1968 agreements with Mountain States covered separate multi-state bargaining units of plant department and traffic department employees, and required each employee who was a member of the Union on a certain date to pay to the Union an amount equal to the periodic dues as a condition of continued employment (J.S. 18-20). The Union also had two 1968 agreements with Western Electric which covered nation-wide bargaining units of certain communications equipment workers and job clerks, and which contained modified-maintenance-of-membership clauses substantially identical to those in the 1968 Mountain States agreements (J.S. 15-17).

In 1971, the Union entered into an agreement with Mountain States covering a company-wide bargaining unit which combined plant department and traffic department employees and contained a modified-agency-shop provision requiring Union members and newly hired employees, 30 days after hire, to pay the Union "amounts equal to the periodic dues applicable to members" as a condition of continued employment (J.S. 26-28). The two 1971 agreements between Western Electric and the Union covered the same units as their 1968 agreements and established union security arrangements like those in the 1971 Mountain States contract (J.S. 23-26).

based in Colorado in a referendum conducted by the Colorado Industrial Commission, as required by the Colorado Labor Peace Act, C.R.S. 1973 Section 80-4-1 *et seq.* (now Section 8-3-101 *et seq.*) (J.S. 21, 22-23).[3] Following execution of the three 1971 agreements, both Western Electric and Mountain States continued to refuse to apply the union security provisions in the contracts to their Colorado employees (J.S. 28).

Thereafter, the Union brought suit in Colorado district court, seeking a declaratory judgment that the Labor Peace Act did not cover the union security arrangements contained in the 1968 and 1971 contracts. Alternatively, the Union requested a declaration that, if state law did apply to those arrangements, they were nevertheless lawful because the state's method of regulation was "invalid on grounds of federal preemption" (J.S. 72, 77).

The Colorado district court construed the Labor Peace Act to apply to the union security provisions in the contracts. It further found that federal law did not preempt Colorado from conditioning the validity of union security agreements within the state upon an "all-union" referendum among bargaining unit employees (J.S. 13-53).

The Colorado Supreme Court, sitting *en banc*, affirmed the district court over the dissent of Chief Justice Pringle (J.S. 55-86). The Colorado Supreme Court held that, under Section 14(b) of the National Labor Relations Act ("NLRA"), 29 U.S.C. 164(b), and *Algoma Plywood & Veneer Co.* v. *Wisconsin Employment Relations Board*, 336 U.S. 301, Colorado was empowered to

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[3]The pertinent provisions of the Colorado Labor Peace Act are set forth at J.S. 3-4.

regulate union security agreements negotiated with employers subject to the NLRA (J.S. 80-84). The court further held that (J.S. 76-77)—

> [a] secret ballot election, as described by section 80-4-2(6) [8-3-104(4)], is the exclusive method by which a collective bargaining unit subject to the "all-union" referendum provisions of section 80-4-6(1)(d) [8-3-104(1)] may be recognized. Correlatively, we hold that a collective bargaining unit, as defined by section 80-4-2(6) [8-3-104(4)], is a condition precedent to any labor organization's right to enter into an all-union agreement with an employer under Colorado law. Inasmuch as no secret ballot election was conducted for the purpose of establishing a collective bargaining unit authorized to enter into an all-union agreement with Mountain States and Western Electric, [the Union] is not entitled to the enforcement of the all-union agreements provisions which are, in our opinion, invalid. Even if such an election had been held and an appropriately authorized collective bargaining unit had been established, the union security provisions here in issue would be invalid and unenforceable because of the lack of employee approval through an all-union referendum.

Chief Justice Pringle concluded in dissent that while Section 14(b) of the NLRA permits states to prohibit union security arrangements, it does not authorize state regulation of such arrangements in the manner approved by the majority (J.S. 85-86). In his view, any other reading of Section 14(b) could result in "50 different standards as to how and when union and agency shops might be negotiated" (J.S. 85).

DISCUSSION

Section 9(b) of the NLRA, 29 U.S.C. 159(b), confers upon the National Labor Relations Board jurisdiction to determine, in cases involving representation of the employees of employers whose operations affect commerce within the meaning of the Act, whether "the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." It is settled that Congress intended this jurisdiction to be exclusive. *La Crosse Telephone Corp.* v. *Wisconsin Employment Relations Board*, 336 U.S. 18; *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U.S. 767. The Colorado Supreme Court has held in the present case that a state may superimpose a state-determined collective bargaining unit upon a Board-recognized unit, incidental to exercising the power over union security agreements conferred upon it under Section 14(b) of the NLRA. The Board believes that the Colorado Supreme Court's holding is erroneous and that prompt corrective action by this Court is warranted.

1. Section 14(b) of the NLRA, with obvious reference to Section 8(a)(3), 29 U.S.C. 158(a)(3), declares that "[n]othing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law." Thus, Congress has permitted a state, if it desires, to enact more comprehensive restrictions on union-security arrangements than those contained in the first proviso to Section 8(a)(3).

In *Algoma Plywood & Veneer Co.* v. *Wisconsin Employment Relations Board, supra*, this Court construed Section 14(b) as permitting a state not merely to "prohibit" union security arrangements, but also to "regu-

late" them more stringently than does the NLRA. Specifically, this Court held in *Algoma* that the State of Wisconsin could prevent an employer, engaged in commerce within the meaning of the NLRA, from discharging an employee under a union security agreement which, although valid under federal law, had not been authorized by the referendum required by state law.[4] The Court further held that Wisconsin could remedy this unlawful action by ordering the employer to cease giving effect to the union security agreement and to reinstate the employee with back pay.

2. In light of the foregoing, it would appear that, insofar as the Colorado Labor Peace Act conditions the validity of a union security agreement covering employees working in Colorado upon approval by at least three-quarters of the employees voting in an "all-union" referendum conducted by the State, such condition is not barred by the NLRA—even though the operations of the employer affect commerce within the meaning of the Act and thus are subject to the Board's jurisdiction. However, the Colorado Supreme Court has interpreted the Labor Peace Act as precluding the State, even when a bargaining unit approved or certified by the Board already exists, from holding such referendum in that unit, or among the Colorado workers in that unit (where,

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[4]The Wisconsin statute at issue in *Algoma* defined as an unfair labor practice discrimination with regard to employment by any employer for the purpose of encouraging membership in a labor organization. But the statute also provided that (see 336 U.S. at 303-304)—

> an employer shall not be prohibited from entering into an all-union agreement with the representatives of his employees in a collective bargaining unit, where at least two-thirds of such employes voting * * * shall have voted affirmatively by secret ballot in favor of such all-union agreement in a referendum conducted by the [Wisconsin Employment Relations Board]. * * *

as here, the unit is a multi-state unit). Rather, it has held that, irrespective of the existence of a unit approved by the Board, the State is required, as a condition precedent to an all-union referendum election, to conduct a separate election by secret ballot to determine a collective bargaining unit under the provisions of the Labor Peace Act. We agree with the State that this requirement, which constitutes a departure from the State's past practice,[5] presents such danger of conflict with, and impairment of, the Board's unit determination that it cannot stand.

a. Under the NLRA, the Board determines whether the unit appropriate for collective bargaining purposes shall be "the employer unit, craft unit, plant unit, or subdivision thereof" (Section 9(b), 29 U.S.C. 159(b)). Under the Labor Peace Act, that responsibility rests with the employees themselves: that is, the Labor Peace Act requires the director of the Colorado Industrial Commission to include "on any ballot for the selection of a bargaining unit the names or suitable description of each bargaining unit submitted to the director and claimed to be the appropriate unit by an employee or group of employees participating in the election" (C.R.S. 1973 Section 8-3-107(3)). Depending upon the wishes of a majority of the employees, the "collective bargaining unit" under Colorado law may consist of "the employees of one employer employed

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[5] As the State pointed out (J.S. 7):

> Prior to this decision, the state agency conducted unit certification elections only for those units which were not within the jurisdiction of the National Labor Relations Act. The state did not construe the act as requiring a state unit certification election, as a prerequisite to an all-union agreement referendum, for units which previously had been certified or recognized by the National Labor Relations Board.

within the state," or "a single craft, division, department, or plant" of that employer (C.R.S. 1973 Section 8-3-104(4)).

In these circumstances, it is not unlikely that the Colorado employees of an employer for whom the Board has already established a bargaining unit would, in a Colorado collective bargaining unit election, vote for a unit or units which are vastly different from the unit created or approved by the Board. For example, in the case of a multi-state, company-wide Board unit, as here, Colorado employees could select under state law a variety of units in addition to or inconsistent with the unit approved by the Board: a plant-wide unit at one plant, a craft-wide unit at a second plant, and no unit at a third plant.[6] The likelihood of such variation is enhanced by the view of the Colorado Supreme Court that there is "a strong policy in the Labor Peace Act in favor of fractional representation of the employees of one employer." *Dry Cleaners and Laundry Workers Local Union No. 304* v. *Sunnyside Cleaners and Shirt Laundry,* 146 Colo. 31, 360 P. 2d 446, 449.

b. Although the Colorado Supreme Court has suggested that the unit election mandated by state law as a precondition for holding an all-union referendum need not serve to determine the unit appropriate for bargaining

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[6]It is also possible that the state units would include individuals who are not included in the Board unit. The state director is empowered to "determine which persons shall be qualified and entitled to vote at any election held by him" (C.R.S. 1973 Section 8-3-107(5)). Contrary to Section 9(b)(3) of the NLRA, 29 U.S.C. 159(b)(3), the Labor Peace Act does not preclude the inclusion of plant guards in the same unit with other employees. And, while the Labor Peace Act appears to exclude supervisors from the definition of "employee" (C.R.S. 1973 Section 8-3-104(11)(a)), it does not contain a definition of "supervisor" comparable to that in Section 2(11) of the NLRA, 29 U.S.C. 152(11).

purposes,[7] the Labor Peace Act provides otherwise. C.R.S. 1973 Section 8-3-104(4). And, if the state's unit election does serve, in fact, to determine a bargaining representative, such result would be inconsistent with this Court's decisions in *La Crosse* and *Bethlehem, supra,* which held that there cannot be two representatives or two bargaining units for the same employees.[8]

c. Moreover, even accepting the view of the Colorado Supreme Court that the unit election contemplated by it would serve merely to determine the unit in which to hold a referendum concerning the issue of union security, the likely interference with the Board's unit determination

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[7]The court stated (J.S. 81-82):

> The issue of a state's power to recognize or certify collective bargaining units must not be confused with the state's power to regulate union security agreement. * * * In Colorado, a "collective bargaining unit" for purposes of the union security agreement provision of the Colorado Labor Peace Act, may be something different than a collective bargaining unit for other purposes of labor-management relations. * * * Viewed as such, the procedures for establishing a collective bargaining unit under the Colorado Labor Peace Act are merely an incident of the state's power to prohibit the application of union security agreements under the permissive grant of authority contained in § 14(b) of the Taft-Hartley Act. The application of section 80-4-2(6) [8-3-104(4)] to the union security provisions of the Colorado Labor Peace Act is severable from its application in other contexts of the Act.

[8]As the Court stated in *Bethlehem, supra,* 330 U.S. at 776:

> If the two [state and federal] boards attempt to exercise a concurrent jurisdiction to decide the appropriate unit of representation, action by one necessarily denies the discretion of the other * * * . The federal board has jurisdiction of the industry in which these particular employers are engaged and has asserted control of their labor relations in general. * * * We do not believe this leaves room for the operation of the state authority asserted.

still would be substantial. A union which has been designated by the Board as the representative of a particular unit of employees would find it difficult, if not impossible, to negotiate a collective bargaining agreement for the unit if the issue of union security for Colorado-based workers depended upon the outcome of elections conducted in a variety of unpredictable units which differed from the unit approved by the Board—and perhaps even included employees not included in the Board unit.[9] The potential for interference with the union's representative function in the Board unit would be far greater in such circumstances than if the State limited the union security referendum to the Board unit or to the Colorado-based workers in that unit (where, as here, the Board unit is multi-state).[10] Cf. *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 285-286.

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[9]If the Colorado unit included individuals not in the Board unit, it is possible that a union security provision could be rejected as the result of the vote of individuals whom the union, insofar as the NLRA was concerned, did not represent. On the other hand, should a union security provision be approved in such unit, the union would be compelled, insofar as state law was concerned, to represent those individuals in negotiations over union security. Cf. C.R.S. 1973 Section 8-3-108(1)(c) ("[t]he director shall declare any such all-union agreement terminated whenever he finds that the labor organization involved unreasonably has refused to receive as a member any employee of such employer").

[10]Where the unit approved or certified by the Board for representation purposes covers employees working in more than one state, and some of those states restrict union security arrangements more stringently than does the NLRA, it is necessary, in order to give effect to the privilege accorded the states under Section 14(b) of the NLRA, to create a union security unit that is smaller than the Board representation unit. But in contrast to the units mandated by the decision below, such a modified unit is not independent of the unit approved by the Board for representation purposes, and it does not include any employees not included in the representation unit.

d. Finally, to permit the State to establish units different from those approved by the Board creates the possibility that unions and employers will be faced with the Hobson's choice of either violating the NLRA by applying a union security agreement that complies with Colorado law or violating Colorado law by applying a union security agreement that complies with the NLRA. The first proviso to Section 8(a)(3) of the NLRA, 29 U.S.C. 158(a)(3), permits the discharge of an employee for failure to pay union dues as required by a union security agreement only "if [the union] is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made * * * ." Accordingly, an employer would violate Section 8(a)(3), and a union Section 8(b)(2), 29 U.S.C. 158(b)(2), of the NLRA by enforcing a union security agreement covering a bargaining unit other than that approved by the Board under Section 9 of the Act. Such violation is particularly likely to occur when the agreement covers a unit that is clearly inappropriate under the NLRA because it contains individuals, such as supervisors, who are statutorily excluded from Section 9 units. See, *e.g., St. Luke's Hospital Center,* 221 N.L.R.B. No. 217, 91 L.R.R.M. 1150.[11] On the other hand, should an employer or union attempt to apply a union security arrangement covering the Board-approved unit, rather than the state-approved union security unit, they would, under the decision below, violate the Labor Peace Act (see C.R.S. 1973 Section 8-3-108(1)(c), (2)(b)).

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[11]Enforced *sub nom. National Labor Relations Board* v. *St. Luke's Hospital Center,* C.A. 2, No. 76-4088 (decided December 29, 1976).

CONCLUSION

For the foregoing reasons, probable jurisdiction of the State's appeal should be noted and the judgment of the Colorado Supreme Court should be reversed.

Respectfully submitted.

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JANUARY 1977.

DOJ-1977-01

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